

**Civil Action Nos. 3:21-cv-01974-X, 3:21-cv-01979-S**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS**

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**In re: Highland Capital Management, L.P.,  
*Debtor.***

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**The Charitable DAF Fund, L.P.; CLO Holdco, Ltd.; Mark Patrick; Sbaiti &  
Company PLLC; Mazin A Sbaiti; Jonathan Bridges; and James Dondero,  
*Appellants,***

**v.**

**Highland Capital Management, L.P.,  
*Appellee.***

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On Appeal from the United States Bankruptcy Court for  
the Northern District of Texas, Case No. 19-34054  
Hon. Stacey G.C. Jernigan, Presiding

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**APPENDIX IN SUPPORT OF BRIEF OF APPELLANT JAMES DONDERO**

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## APPENDIX

<b>Tab</b>	<b>ECF No.</b>	<b>Document</b>	<b>Record Citations</b>	<b>App. Pages</b>
A.	Bankr. Dkt. 2660	Memorandum Opinion and Order Holding Certain Parties in Civil Contempt of Court for Violation of Bankruptcy Court Orders	000009 – 000039	001-032
B.	Bankr. Dkt. 2440	Transcript of hearing conducted on June 8, 2021	009805 – 010102	033-335

Dated: December 13, 2021      Respectfully submitted,

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**ATTORNEYS FOR APPELLANT  
JAMES DONDERO**

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on December 13, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Appellee and all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink  
Bryan C. Assink

# TAB A



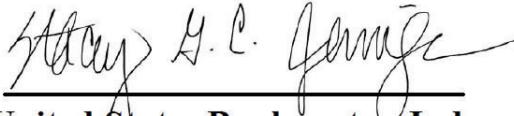
CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 3, 2021

  
\_\_\_\_\_  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>1</sup>

Debtor.

§ Chapter 11

§ Case No. 19-34054-sgj11

§

**MEMORANDUM OPINION AND ORDER HOLDING CERTAIN PARTIES AND  
THEIR ATTORNEYS IN CIVIL CONTEMPT OF COURT FOR VIOLATION OF  
BANKRUPTCY COURT ORDERS<sup>2</sup>**

**I. Introduction.**

This Memorandum Opinion and Order addresses the *second* civil contempt matter that this bankruptcy court has been asked to address since confirmation of a Chapter 11 plan for Highland Capital Management, L.P. (the “Debtor” or “Highland”) on February 22, 2021. In this instance,

<sup>1</sup> The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

<sup>2</sup> This ruling constitutes the court’s findings of fact and conclusions of law, pursuant to Fed. R. Bankr. Pro. 7052, in connection with the Motion, Memorandum of Law, Declaration, and Show Cause Order found at DE ## 2235, 2236, 2237, 2247, and 2255 in the above-referenced Bankruptcy Case.

Highland seeks to have at least two entities held in civil contempt of two bankruptcy court orders and imposed with sanctions: Charitable DAF Fund, L.P. (“DAF”) and CLO Holdco, Ltd. (“CLO Holdco”) (collectively, the “Alleged Contemnors”). Highland also seeks to have a law firm that has recently begun representing the Alleged Contemnors (Sbaiti & Company PLLC) held in civil contempt of the bankruptcy court, as well as any control-persons who authorized the Alleged Contemnors (“Authorizing Persons”) to take the allegedly contemptuous actions.

First, who are these Alleged Contemnors? DAF<sup>3</sup> is alleged to be a charitable fund and a limited company that was formed in the Cayman Islands. DAF is the 100% owner of CLO Holdco, which is also a Cayman Islands entity. Thus, DAF controls CLO Holdco.<sup>4</sup> DAF was founded by Highland’s former Chief Executive Officer (“CEO”) and indirect beneficial equity owner—Mr. James Dondero (“Mr. Dondero”). DAF controls \$200 million of assets, which asset base was derived from Highland, Mr. Dondero, Mr. Dondero’s family trusts, or other donor trusts.<sup>5</sup> Mr. Dondero has historically been DAF’s informal investment advisor (without an agreement), and he was DAF’s managing member until 2012.<sup>6</sup> In 2012, an individual named Grant Scott (a patent lawyer with no experience in finance or running charitable organizations, who was Mr. Dondero’s long-time friend, college housemate, and best man at his wedding) became DAF’s managing member.<sup>7</sup> Then, Grant Scott resigned from that role, on or around January 31, 2021, after apparent

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<sup>3</sup> The acronym “DAF” stands for donor advised fund.

<sup>4</sup> Debtor’s Exh. 25 [DE # 2410]. CLO Holdco has sometimes been referred to as the “investment arm” of the DAF organizational structure. Transcript of 6/8/21 Hearing at 122:17-20.

<sup>5</sup> Transcript 6/8/21 Hearing at 98:3-99:15 (testimony that the donors “gave up complete dominion and control over the respective assets and at that time claimed a federal income tax deduction for that”).

<sup>6</sup> *Id.* at 149:16-150:2.

<sup>7</sup> *Id.* at 150:3-5; 154:11-24; 156:7-10. See also Debtor’s Exh. 23 (Grant Scott Deposition 1/21/21) at 24-25; 28:21 (“I think he is my closest friend”) [DE # 2410].

disagreements with Mr. Dondero. After having no manager for a couple of months, an individual named Mark Patrick (“Mr. Patrick”) became DAF’s general manager on March 24, 2021 (just 19 days before the events occurred that are the subject of this contempt matter). It appears that Mr. Scott assigned his interests that undergirded his managing member role to Mr. Patrick at Mr. Patrick’s direction.<sup>8</sup> Mr. Patrick was an employee of Highland (having had some sort of a “tax counsel” role—but not in Highland’s legal department) from 2008 until early 2021, and he now is an employee of Highgate Consultants, d/b/a Skyview Group, which is an entity recently created by certain former Highland employees.<sup>9</sup> Mr. Patrick had no prior experience running a charitable organization prior to becoming DAF’s manager on March 24, 2021 (just like Grant Scott).<sup>10</sup> He testified that he “hold[s] [him]self out as a tax professional versant on setting up offshore master fund structures.”<sup>11</sup>

What were the allegedly contemptuous actions? DAF and CLO Holdco filed: (a) on April 12, 2021, a Complaint<sup>12</sup> (“Complaint”) in the United States District Court for the Northern District of Texas (the “District Court Action”), against the Debtor and two Debtor-controlled entities (*i.e.*, Highland HCF Advisor, Ltd. (“Highland HCFA”) and Highland CLO Funding, Ltd. (“HCLOF”));<sup>13</sup> and then (b) one week later, on April 19, 2021, filed a motion for leave to amend

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<sup>8</sup> Debtor’s Exh. 24 at 90-93 [DE # 2410].

<sup>9</sup> Transcript from 6/8/21 Hearing, at 95:18-97:2 [DE # 2440].

<sup>10</sup> *Id.* at 100:2-103:9. For further clarity, above the Cayman Islands structure for DAF and CLO Holdco, there are various foundations that hold “participation shares.” *Id.* Mr. Dondero is president and director of those foundations. Debtor’s Exh. 23 at 57.

<sup>11</sup> *Id.* at 144:7-8.

<sup>12</sup> Debtor’s Exh. 12 [DE # 2410].

<sup>13</sup> Highland HCFA is a Cayman Islands limited company 100% owned by the Debtor. HCLOF is a limited company incorporated under the laws of Guernsey. It is 49.02% owned by CLO Holdco and the remaining 50%+ is owned by the Debtor or Debtor’s designee, as a result of the HarbourVest Settlement, as further explained herein.

the Complaint to add the Debtor’s current CEO, James P. Seery, Jr. (“Mr. Seery”) as a defendant in the action (the “Seery Motion”).<sup>14</sup> *It is the Seery Motion that is primarily in controversy here.* Note that in the original Complaint, Mr. Seery is named as a “potential party”<sup>15</sup> and, while not nominally a party, he was mentioned approximately 50 times, by this court’s count. Mr. Seery’s conduct is plastered throughout the Complaint, accusing him of deceitful, improper conduct. *The original Complaint does not mention that Highland is still in bankruptcy, nor that the claims asserted in the Complaint are related to a bankruptcy case pursuant to 28 U.S.C. § 1334, but, rather, asserts that federal subject matter jurisdiction exists in the District Court pursuant to 28 U.S.C. §§ 1331 & 1367.*

As will be explained further below, the District Court Action—which in some ways reads like a minority shareholder suit<sup>16</sup>—is all about the alleged impropriety of a settlement (*i.e.*, the “HarbourVest Settlement”) that was proposed by the Debtor to the bankruptcy court in December 2020<sup>17</sup> and approved by the bankruptcy court (with notice to all creditors and after an evidentiary hearing) on January 14, 2021.<sup>18</sup> “HarbourVest” was a collective of investors that had invested approximately \$80 million in the year 2017 into the defendant-entity herein known as HCLOF (acquiring a 49.98% interest in it), and filed six proofs of claim against the Debtor in the bankruptcy case, totaling \$300 million, alleging that the Debtor had committed fraud back in 2017, in

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<sup>14</sup> Debtor’s Exh. 19 [DE # 2410].

<sup>15</sup> Debtor’s Exh. 12 [DE # 2410], ¶6.

<sup>16</sup> Indeed, as alluded to in footnote 13 above, CLO Holdco is a minority shareholder (49.02%) of one of the Defendants, HCLOF, and HCLOF is now more than 50% owned by the Debtor or its designee as a result of the HarbourVest Settlement—a fact that CLO Holdco and DAF apparently do not like.

<sup>17</sup> Declaration of John Morris (Exhs. 1 & 2 attached thereto) [DE # 2237].

<sup>18</sup> “HarbourVest” refers to the collective of HarbourVest Dover Street IX Investment, L.P., HarbourVest 2017 Global AIF, L.P., HarbourVest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and HarbourVest Skew Base AIF, L.P.

connection with its encouraging HarbourVest to invest in and acquire the 49.98% interest in HCLOF. The Debtor and HarbourVest eventually negotiated a settlement of HarbourVest's proofs of claim which, in pertinent part, allowed HarbourVest a \$45 million general unsecured claim in the bankruptcy case and involved HarbourVest transferring its 49.98% interest in defendant HCLOF to the Debtor or Debtor's designee.<sup>19</sup> The bankruptcy court approved this settlement as fair and equitable and in the best interests of the bankruptcy estate.<sup>20</sup>

Despite the full vetting in the bankruptcy court of the HarbourVest Settlement and an order approving the HarbourVest Settlement, which was not appealed by DAF or CLO Holdco,<sup>21</sup> various torts and other causes of action are now being alleged by DAF and CLO Holdco against the Debtor *relating entirely to the HarbourVest Settlement*, including: breach of fiduciary duties owed to DAF and CLO Holdco; breach of the HCLOF membership agreement, and an alleged right of first refusal provision therein; negligence; violations of RICO;<sup>22</sup> and tortious interference. In a nutshell, the gravamen of DAF's and CLO Holdco's Complaint is that the economics of the HarbourVest Settlement resulted in the Debtor obtaining HarbourVest's 49.98% in HCLOF for a value of \$22.5 million, and DAF and CLO Holdco believe that the 49.98% interest was worth far more than this. DAF and CLO Holdco assert that they and HarbourVest were deceived. Somewhat shockingly to

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<sup>19</sup> Declaration of John Morris (Exhs. 1 & 2 attached thereto) [DE # 2237]. HarbourVest basically wanted to rescind its earlier acquisition of the 49.98% to extract itself from Highland.

<sup>20</sup> Declaration of John Morris (Exh. 11 attached thereto) [DE # 2237].

<sup>21</sup> *Id.* The court notes that certain family trusts of Mr. Dondero (known as the Dugaboy and Get Good Trusts) did appeal the bankruptcy court order approving the HarbourVest Settlement. However, there was no stay pending appeal and the settlement was implemented.

<sup>22</sup> Shockingly, DAF and CLO Holdco state that Highland's "actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D)." Debtor's Exh. 12, [DE # 2410], at ¶ 117.

this court, the Complaint implies that information was withheld from DAF and CLO Holdco.<sup>23</sup> DAF and CLO Holdco further argue that they should have been given the opportunity to purchase HarbourVest's 49.98% interest in HCLOF. Mr. Seery is alleged to be the chief perpetrator of wrongdoing. Subsequently, in the Seery Motion, in which DAF and CLO Holdco seek leave to amend the Complaint to add Mr. Seery to the District Court Action, DAF and CLO Holdco were clear for the first time that there is a "pending Chapter 11 proceeding" and disclosed to the District Court that they did not name Mr. Seery in the Complaint since the bankruptcy court "issued an order prohibiting the filing of any causes of action against Seery in any way related to his role at [Highland], subject to certain prerequisites. In that order, the bankruptcy court also asserted 'sole jurisdiction' over all such causes of action."<sup>24</sup> DAF and CLO Holdco went on to state that the bankruptcy court's order "exceeds the bankruptcy court's powers and is unenforceable," but even if enforceable, in an abundance of caution, DAF and CLO Holdco are satisfying the bankruptcy court's mandates by asking the *District Court* for leave to sue Mr. Seery, since the bankruptcy court's powers are derivative from the District Court.<sup>25</sup>

Disturbingly, one of the Alleged Contemnors (CLO Holdco) objected to the HarbourVest Settlement during the bankruptcy case<sup>26</sup> and later withdrew its objection during the bankruptcy

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<sup>23</sup> Mr. Dondero and CLO Holdco appeared at and examined the HarbourVest witness, Michael Pugatch, at a deposition before the hearing on the HarbourVest Settlement. Declaration of John Morris, Exhs. 7 & 8 thereto [DE # 2237]. Moreover, it is rather astounding to this court for anyone to suggest that any human being (Mr. Seery or anyone else) knew more, or withheld, any information that wasn't *well known* to Mr. Dondero and all principals/agents of DAF and CLO Holdco. Mr. Dondero and any personnel associated with DAF and CLO Holdco were as (or more) familiar with HCLOF's assets and their potential value than any human beings on the planet—having managed these assets for years. As one example, it has been represented to the court that HCLOF owns shares in MGM Holdings, Inc. ("MGM"). It is undisputed that Mr. Dondero sits on the MGM Board of Directors. See DE # 2236, n.14.

<sup>24</sup> Debtor's Exh. 17 [DE # 2410] at paragraph 2, p. 1.

<sup>25</sup> *Id.* at paragraph 3, pp. 1-2; & pp.5-8.

<sup>26</sup> Declaration of John Morris (Exh. 6 attached thereto) [DE # 2237].

court hearing regarding the settlement,<sup>27</sup> and did not appeal the order approving the HarbourVest Settlement. CLO Holdco, in its later-withdrawn objection, made the very same argument that it now makes in Count 2 of the Complaint (in its breach of HCLOF membership agreement claim)—*i.e.*, that the Debtor committed a breach of a “right of first refusal” in the HCLOF membership agreement (in fact, this was the sole argument CLO Holdco made in its objection).<sup>28</sup> The Debtor and CLO Holdco submitted briefing on the alleged “right of first refusal” prior to the hearing on the HarbourVest Settlement, and the bankruptcy court spent a fair amount of time reviewing the briefing—only to learn on the morning of the hearing that CLO Holdco was withdrawing its objection.

In any event, the Debtor now alleges that the District Court Action is not only an improper collateral attack on the bankruptcy court’s order approving the HarbourVest Settlement, but—more germane to this civil contempt matter—the motion to amend the District Court Action to add Mr. Seery is a violation of *two* earlier bankruptcy court orders<sup>29</sup> that contained “*gatekeeper provisions*”—*i.e.*, specific provisions *requiring parties to seek bankruptcy court approval before filing lawsuits against the persons controlling the Debtor*. These gatekeeper provisions—which the bankruptcy court considered to be both (a) a way to maintain control of potentially vexatious, distracting litigation (which might interfere with the reorganization effort), and (b) consistent with the United States Supreme Court case of *Barton v. Barbour*,<sup>30</sup> and some of its progeny (as well as

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<sup>27</sup> Declaration of John Morris (Exh. 10 attached thereto), Transcript of 1/14/21 Hearing, at 7:20-8:6 [DE # 2237]. Note that two family trusts of Mr. Dondero had objected to the HarbourVest Settlement (in addition to Mr. Dondero personally), but they made clear at the January 14, 2021 Hearing on the HarbourVest Settlement that they were not asserting that the HCLOF membership agreement (or an alleged right of first refusal therein) was being violated by the HarbourVest Settlement. *Id.* at 22:5-20.

<sup>28</sup> Declaration of John Morris (Exh. 6 attached thereto) [DE # 2237].

<sup>29</sup> Debtor’s Exh. 15 & 16 [DE # 2410].

<sup>30</sup> 104 U.S. 126 (1881).

the second sentence of 28 U.S.C. § 959(a))—were heavily negotiated in the case and significant, since they were put in place against a backdrop of contentious litigation. *No one appealed the two bankruptcy court orders with the gatekeeper provisions.* There were still more gatekeeping provisions in the Debtor’s Chapter 11 plan that the bankruptcy court confirmed on February 22, 2021 (that plan is on appeal at the Fifth Circuit, although the Fifth Circuit has denied a stay pending appeal; at the time of the hearing on this civil contempt matter, the plan had not yet gone effective).

Objections to the Debtor’s request to have the Alleged Contemnors, the Alleged Contemnors’ lawyers, and Authorizing Persons held in civil contempt of court were filed by DAF, CLO Holdco, Sbaiti & Company, PLLC,<sup>31</sup> by Mr. Patrick,<sup>32</sup> and by Mr. Dondero.<sup>33</sup> They argue that the Alleged Contemnors have not violated the bankruptcy court’s prior orders containing gatekeeper provisions because the Alleged Contemnors have *not actually sued* Mr. Seery but, rather, have sought permission from the District Court to sue him. They argue that, even though the January 2020 Corporate Governance Order and July 2020 Seery CEO Order required parties to seek bankruptcy court permission to sue Mr. Seery, that seeking *District Court* permission is appropriate, since district courts actually have bankruptcy subject matter jurisdiction and bankruptcy courts are mere units of the district courts. Moreover, the Alleged Contemnors suggest that the bankruptcy court’s gatekeeper provisions in the two orders *exceeded the reach of its powers*, and, again, their Seery Motion was simply about asking the court with original bankruptcy subject matter jurisdiction (*i.e.*, the District Court) for authority to sue Mr. Seery.

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<sup>31</sup> DE #2313.

<sup>32</sup> DE #2309.

<sup>33</sup> DE #2312.

The bankruptcy court held an evidentiary hearing on the civil contempt matter on June 8, 2021. For the reasons set forth below, the court finds and concludes that DAF, CLO Holdco, Sbaiti & Company, PLLC (and its lawyers Jonathan Bridges and Mazin Sbaiti), Mr. Patrick, and Mr. Dondero are all in civil contempt of at least two bankruptcy court orders of which they had knowledge and were well aware. They shall each be jointly and severally liable for the sum of **\$239,655** as a compensatory sanction for their civil contempt, and they will be purged from their contempt if they pay this amount within 15 days of entry of this Order. Moreover, the court will add on a sanction of **\$100,000** for each level of rehearing, appeal, or petition for *certiorari* that the Alleged Contemnors may choose to take with regard to this Order, to the extent any such motions for rehearing, appeals, or petitions for *certiorari* are not successful.

## II. Background.

A brief summary of the above-referenced bankruptcy case can be found in this court's Memorandum and Opinion issued June 7, 2021, regarding an earlier contempt motion that involved Mr. Dondero and different allegedly contemptuous actions.<sup>34</sup> This court will not repeat that summary herein but will hit some of the most pertinent highlights.

Bankruptcy Filing. On October 16, 2019 (the "Petition Date"), Highland filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Highland is a registered investment advisor that manages billions of dollars of assets. Highland's assets are spread out in numerous, separate fund vehicles. While the Debtor has continued to operate and manage its business as a debtor-in-possession, the role of Mr. Dondero *vis-à-vis* the Debtor was significantly limited early in the bankruptcy case and ultimately terminated. The Debtor's current CEO, Mr. Seery, was selected by the creditors and approved by the bankruptcy court during the Chapter 11 case.

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<sup>34</sup> Adversary Proceeding No. 20-03190, [DE # 190].

Corporate Governance Shake-Up. Specifically, early in the case, the Official Unsecured Creditors Committee (the “UCC”)—whose members asserted well over \$1 billion worth of claims and whose members had been in litigation with Highland for many years in many courts—and the U.S. Trustee (“UST”) both desired to have a Chapter 11 Trustee appointed in Highland’s bankruptcy case—absent some major change in corporate governance—due to conflicts of interest and the alleged self-serving, improper acts of Mr. Dondero and possibly other former officers. Under this pressure, the Debtor negotiated a term sheet and settlement with the UCC, which was executed by Mr. Dondero and approved by a bankruptcy court order on January 9, 2020 (the “January 2020 Corporate Governance Order”).<sup>35</sup> The settlement and term sheet contemplated a *complete overhaul of the corporate governance structure of the Debtor.* Mr. Dondero resigned from his role as an officer and director of the Debtor and of the Debtor’s general partner. Three new independent directors (the “Independent Board”) were appointed to govern the Debtor’s general partner—Strand Advisors, Inc. (“Strand”—which, in turn, manages the Debtor. All of the new Independent Board members were selected by the UCC and are very experienced within either the industry in which the Debtor operates, restructuring, or both. The three Independent Board members are: Retired Bankruptcy Judge Russell Nelms; John Dubel; and Mr. Seery. As noted above, one of the Independent Board members, Mr. Seery, was ultimately appointed as the Debtor’s new CEO and CRO on July 16, 2020 (the “July 2020 Seery CEO Order”).<sup>36</sup> To be clear, Highland—during the bankruptcy case and still now—is governed by these wholly new,

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<sup>35</sup> See Debtor’s Exh. 15 [DE # 2410]. The exact title and location on the Bankruptcy Docket for this Order is: Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [DE # 339].

<sup>36</sup> See Debtor’s Exh. 16 [DE # 2410]. The exact title and location on the Bankruptcy Docket for this Order is: Order Approving Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020 [DE # 854].

Independent Board members who had no prior connection to Highland. They were brought in to build trust with creditors and to hopefully put an end to a litigation culture that permeated Highland.

As for Mr. Dondero, while not originally contemplated as part of the January 2020 Corporate Governance Settlement, the Debtor proposed at the hearing on the January 2020 Corporate Governance Settlement that Mr. Dondero remain on as an unpaid employee of the Debtor and also continue to serve as a portfolio manager for certain separate *non-Debtor* investment vehicles/entities whose funds are managed by the Debtor. The court approved this arrangement when the UCC ultimately did not oppose it. Mr. Dondero's authority with the Debtor was subject to oversight by the Independent Board,<sup>37</sup> and Mr. Seery was given authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its subsidiaries, as well as the purchase and sale of assets that the Debtor manages for various separate non-Debtor investment vehicles/entities.

Eventually, the Debtor's new Independent Board concluded that it was untenable for Mr. Dondero to continue to be employed by the Debtor in any capacity because of conflicts and friction on many issues. Mr. Dondero's employment arrangement with the Debtor ceased in October 2020, but the termination of his employment was not the end of the friction between the Debtor and Mr. Dondero. In fact, a week after his termination, litigation posturing and disputes began erupting between Mr. Dondero and certain of his related entities, on the one hand, and the Debtor on the other.

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<sup>37</sup> "Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors . . . [and] will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero agrees to resign immediately upon such determination." See Debtor's Exh. 15 (paragraph 8 therein). [DE # 2410].

Plan Confirmation. The bankruptcy court confirmed a Chapter 11 plan on February 22, 2021. The plan was supported by the UCC and an overwhelming dollar amount of creditors. Mr. Dondero and certain entities related to him objected to the plan and have appealed the Confirmation Order. Mr. Seery remains as the executive of the Debtor, and will continue to serve in that role, under a specific structure established in the plan and accompanying documents (with oversight by the court and creditor representatives).

### **III. The Impetus for this Second Civil Contempt Matter.**

#### **A. The Orders.**

The subject of this second civil contempt matter is, primarily, two orders *that were never appealed*: (a) the January 2020 Corporate Governance Order; and (b) the July 2020 Seery CEO Order—both referenced above.<sup>38</sup>

#### **B. The Gatekeeper Provisions in the Two Orders.**

As mentioned above, these orders contained certain provisions that are sometimes referred to as “gatekeeper” provisions. These “gatekeeper” protections require litigants to obtain the bankruptcy court’s approval before suing certain protected parties in control of the Debtor for actions arising in the course of their duties, including Mr. Seery.

Paragraph 10 of the January 2020 Corporate Governance Order provided:

No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director’s agents, or any Independent Director’s advisors relating in any way to the Independent Director’s role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director’s agents, or any Independent Director’s advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

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<sup>38</sup> Debtor’s Exhs. 15 & 16. The HarbourVest Settlement Order described above is likewise significant to this analysis (also not appealed by the Alleged Contemnors).

Similarly, paragraph 5 of the July 2020 Seery CEO Order provided:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Despite these gatekeeper provisions, on April 12, 2021, the Alleged Contemnors, through new counsel (*i.e.*, different from the lawyers who represented them during the Bankruptcy Case previously) filed the District Court Action and promptly thereafter filed the Seery Motion asking the District Court for permission to add him as a defendant.

### C. A Few Words About Gatekeeper Provisions.

Gatekeeper provisions are not uncommon in the world of bankruptcy. There are multiple decisions from the Northern District of Texas<sup>39</sup> (as well as other districts)<sup>40</sup> approving gatekeeper

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<sup>39</sup> See, e.g., *In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72 (Bankr. N.D. Tex. Jan. 14, 2010) (bankruptcy court channeled to itself exclusive jurisdiction to hear claims against debtors' management (including their boards of directors and chief restructuring officer) and the professionals based upon their conduct in pursuit of their responsibilities during the chapter 11 cases.); see also *In re CHC Group, Ltd.* (Case No. 16-31854, Bankr. N.D. Tex.) Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization [DE # 1671-1, attached to Findings of Fact and Conclusions of Law, and Order Confirming the Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization], Section 10.8(b) at 57 (court retained **exclusive** jurisdiction to hear claims against any "Protected Party," including any claims "in connection with or arising out of . . . the administration of this Plan or the property to be distributed under this Plan, . . . or the transactions in furtherance of the foregoing, . . .") (emphasis added); see also *Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988) (bankruptcy court must determine that claim is colorable before authorizing a committee to sue in the stead of the debtor).

<sup>40</sup> See, e.g., *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 546 B.R. 284 (Bankr. S.D.N.Y. 2016) (bankruptcy court acts as gatekeeper to determine whether claims of certain creditors against certain Madoff feeder funds are direct claims (claims which may be brought by the creditor) or derivative claims (claims which either can only be brought by the Madoff post-confirmation liquidating trust or have already been settled by the trust)); *In re Motors Liquidation Co.*, 541 B.R. 104 (Bankr. S.D.N.Y. 2015) (discussing bankruptcy court's gatekeeper function over GM ignition switch cases); *In re Motors Liquidation Co.*, 568 B.R. 217 (Bankr. S.D.N.Y. 2017) (same). The use of the gatekeeper structure in the General Motors cases is particularly noteworthy. The causes of action arising from defective ignition switches are based on state tort law – both product liability and personal injury – and are causes of action unquestionably outside the jurisdiction of a bankruptcy court to hear on the merits. Nevertheless, the General Motors bankruptcy court acted as the gatekeeper post-confirmation to determine whether such litigation should proceed against the estate of the old debtor or the asset purchaser under the confirmed plan.

provisions that either: (a) granted exclusive jurisdiction in the bankruptcy court to hear matters challenging the actions of debtors' officers and directors arising from their conduct in the bankruptcy cases; or (b) at least granted power to a bankruptcy court to determine whether such matters could go forward.<sup>41</sup>

Bankruptcy courts frequently determine that the "Barton Doctrine" supports gatekeeper provisions and may, by analogy, sometimes be applied to executives and independent directors of debtors in possession. The "Barton Doctrine" originated from an old Supreme Court case<sup>42</sup> dealing with receivers. The "Barton Doctrine" was eventually expanded in bankruptcy jurisprudence to apply to bankruptcy trustees. As this court once noted regarding the "Barton Doctrine":

[It] provides that, as a general rule, before a suit may be brought against a trustee, leave of the appointing court (*i.e.*, the bankruptcy court) must be obtained. The Barton doctrine is not an immunity doctrine but—strange as this may sound—has been held to be a jurisdictional provision (in other words, a court will not have subject matter jurisdiction to adjudicate a suit against a trustee unless and until the bankruptcy court has granted leave for the lawsuit to be filed).<sup>43</sup>

Courts have articulated numerous rationales for having this jurisdictional gatekeeping doctrine. One is that, because a "trustee in bankruptcy is an officer of the court that appoints him,"<sup>44</sup> the appointing court "has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties."<sup>45</sup> Another rationale is that the leave requirement

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<sup>41</sup> See *Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015) (under "Barton Doctrine," litigant must still seek authority from the bankruptcy court that appointed the trustee before filing litigation even if the bankruptcy court may not have jurisdiction to adjudicate the underlying claim).

<sup>42</sup> *Barton v. Barbour*, 104 U.S. 126 (1881).

<sup>43</sup> *Baron v. Sherman (In re Ondova Ltd. Co.)*, 2017 Bankr. LEXIS 325, \*29 (Bankr. N.D. Tex. February 1, 2017); report and recommendation adopted, *Baron v. Sherman (In re Ondova Co.)*, 2018 U.S. Dist. LEXIS 13439 (N.D. Tex. Jan. 26, 2018), aff'd, *In re Ondova Ltd.*, 2019 U.S. App. LEXIS 3493 (5th Cir. 2019).

<sup>44</sup> *In re Lehal Realty Assocs.*, 101 F.3d 272, 276 (2d Cir. 1996).

<sup>45</sup> *Id.*

“enables the bankruptcy court to maintain control over the estate and furthers the goal of centralizing all creditors’ claims so they can be efficiently administered.”<sup>46</sup> Yet other courts have expressed an underlying reason for the doctrine is to maintain a panel of competent and qualified trustees and to ensure efficient administration of bankruptcy estates: Without the leave requirement, “trusteeship w[ould] become a more irksome duty” and it would become “harder for courts to find competent people to appoint as trustees. Trustees w[ould] have to pay higher malpractice premiums” and “this w[ould] make the administration of bankruptcy estates more expensive.”<sup>47</sup> Finally, another policy concern underlying the doctrine is a concern for the overall integrity of the bankruptcy process and the threat of trustees being distracted from or intimidated from doing their jobs. For example, losers in the bankruptcy process might turn to other courts to try to become winners there—by alleging the trustee did a negligent job.<sup>48</sup> The Fifth Circuit has recently recognized the continuing vitality of the “Barton Doctrine”—even after *Stern v. Marshall*<sup>49</sup> (that is, even in a scenario in which the appointing bankruptcy court might not itself have Constitutional authority to *adjudicate* the claims asserted against the trustee pursuant to the *Stern* decision).<sup>50</sup>

To be clear, the “Barton Doctrine” originated as a protection for federal receivers, but courts expanded the concept to bankruptcy trustees, and eventually it has been applied to various court-appointed and court-approved fiduciaries and their agents in bankruptcy cases, including debtors in

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<sup>46</sup> *In re Ridley Owens, Inc.*, 391 B.R. 867, 871 (Bankr. N.D. Fla. 2008).

<sup>47</sup> *McDaniel v. Blust*, 668 F.3d 153, 157 (4th Cir. 2012) (citing *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998)). See also generally 1 COLLIER ON BANKRUPTCY 10-4 & 10-5 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016).

<sup>48</sup> *Linton*, 136 F.3d at 545-546.

<sup>49</sup> *Stern v. Marshall*, 564 U.S. 462 (2011).

<sup>50</sup> See *Villegas v. Schmidt*, 788 F.3d 156, 58-59 (5th Cir. 2015).

possession,<sup>51</sup> officers and directors of a debtor,<sup>52</sup> and the general partner of a debtor.<sup>53</sup> In the Highland case, since Mr. Seery and the Independent Directors were proposed by the UCC to avoid the appointment of a trustee, it seemed rather obvious to the bankruptcy court that they should have similar protections from suit—particularly against the backdrop of a litigation culture at Highland that had theretofore existed.

DAF and CLO Holdco argue that the gatekeeper provisions that are involved here run afoul of 28 USC § 959(a) and are an inappropriate extension of the “Barton Doctrine” and, more generally, they argue that the January 2020 Corporate Governance Order and July 2020 Seery CEO Order simply went too far by precluding claims being asserted against Mr. Seery that are lesser than gross negligence and willful misconduct—suggesting that precluding claims lesser than gross negligence and willful misconduct (such as a mere negligence claim) would violate federal law (the Investment Advisors Act) because Mr. Seery cannot contract away his fiduciary duties in this regard.

Putting aside for the moment the fact that the January 202 Corporate Governance Order and the July 2020 Seery CEO Order are final and nonappealable orders that have *res judicata* effect, DAF and CLO Holdco are simply wrong about 28 U.S.C. § 959(a) and the unavailability of the “Barton Doctrine” in a situation such as this. 28 U.S.C. § 959(a) states:

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<sup>51</sup> *Helmer v. Pogue*, 2012 U.S. Dist. LEXIS 151262 (N.D. Ala. Oct. 22, 2012) (applying Barton Doctrine to debtor in possession); see also 11 U.S.C §§ 1107(a) (providing that a debtor in possession has all the rights and duties of a trustee and serves in the same fiduciary capacity).

<sup>52</sup> See *Carter v. Rodgers*, 220 F.3d 1249, 1252 & n.4 (11th Cir. 2000) (debtor must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer for acts done in the actor’s official capacity, and finding no distinction between a “bankruptcy-court-appointed officer” and officers who are “approved” by the court); *Hallock v. Key Fed. Sav. Bank (In re Silver Oak Homes)*, 167 B.R. 389 (Bankr. D. Md. 1994) (president of debtor).

<sup>53</sup> *Gordon v. Nick*, 1998 U.S. App. LEXIS 21519 (4th Cir. 1998) (managing partner of debtor).

Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. ***Such actions shall be subject to the general equity of such court*** so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. (Emphasis added.)

To be sure, this statute has long been recognized as a limited exception to the “Barton Doctrine,” so that trustees and debtors in possession can be sued for postpetition torts or other causes of action that happen to occur in the ***ordinary course of operating a business*** (as opposed to actions of the trustee while engaged in the general administration of the case)—the classic example being a “slip and fall” personal injury suit that might occur on the premises of a business that a trustee or debtor in possession is operating.<sup>54</sup> However, DAF and CLO Holdco ignore the last sentence of the statute that gives the appointing court the equitable powers to control the litigation “as the same may be necessary to the ends of justice.” This is precisely what a gatekeeper provision is all about.<sup>55</sup>

But as earlier noted, DAF and CLO Holdco are too late to argue about the legality or enforceability of the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order. The Fifth Circuit has made clear that, if a party fails to object to or appeal a final order—even one that grants relief that may be outside of a bankruptcy court’s jurisdiction—the order is *res judicata* as to parties who had the opportunity to object to it. It becomes the law of the case and is

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<sup>54</sup> E.g., *Muratorev. Darr*, 375 F.3d 140, 144 (1st Cir. 2004) (section 959(a) “is intended to ‘permit actions redressing torts committed in furtherance of the debtor’s business, such as the common situation of a negligence claim in a slip and fall case where a bankruptcy trustee, for example, conducted a retail store’”) (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1254 (11th Cir. 2000)). See also *Lebovits v. Scheffel* (*In re Lehal Realty Assocs.*), 101 F.3d 272, 276 (2d Cir. 1996); *In re Am. Associated Sys., Inc.*, 373 F. Supp. 977, 979 (E.D. Ky. 1974).

<sup>55</sup> The court further notes anecdotaly that DAF and CLO Holdco demanded a jury trial in their Complaint, and they have alluded to this as a reason why it was appropriate to bring their suit in the District Court. But it appears they contractually waived their jury trial rights in a prepetition agreement with Highland. See DE # 2495, Ex. A thereto, ¶14(f).

not subject to collateral attack.<sup>56</sup> The Supreme Court has more recently stated this principle in the bankruptcy context in *United Student Aid Funds, Inc. v. Espinosa*.<sup>57</sup>

In summary, there can be no doubt that there are two binding, nonappealable final orders<sup>58</sup> that govern in the situation at bar. Not only were they wholly proper but parties are now bound by them regardless.

#### IV. The Evidence at the June 8, 2021 Hearing.

The bankruptcy court held an evidentiary hearing on the civil contempt matter on June 8, 2021. The court considered the Declaration of John Morris (with Exhibits 1-18 thereto), at DE # 2237; Debtor's Exhibits 12-55, at DE ## 2410 & 2421; Exhibits 1, 3-12, 15-28, 30-46 of DAF, CLO Holdco, and Mr. Patrick at DE ## 2411 & 2420; and the live witness testimony of Mr. Patrick and Mr. Dondero.

There really is very little, if anything, in dispute. No one disputes the existence of the January 2020 Corporate Governance Order or the July 2020 Seery CEO Order or the Harbourvest Settlement. No one disputes the existence of the District Court Action or the Seery Motion. Thus, all that the court heard at the June 8, 2021 hearing that was "new," beyond what was in the pleadings and documents, was the explanations/rationales given by those involved with filing the District Court Action and the Seery Motion.

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<sup>56</sup> *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5<sup>th</sup> Cir. 1987).

<sup>57</sup> 130 S. Ct. 1367 (2010) (order confirming Chapter 13 plan, that improperly proposed to discharge a student loan without a hardship adversary proceeding, was not void where there had been no objection or appeal).

<sup>58</sup> DAF and CLO Holding presented a case at the June 8, 2021 hearing suggesting the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order might not have been final orders. The case dealt with an employment order under Section 327 of the Bankruptcy Code, and this court does not believe it was applicable here.

Mr. Patrick testified that he became the manager/director of DAF and CLO Holdco on March 24, 2021,<sup>59</sup> and he earns no compensation for that role, although the prior manager/director, Mr. Grant Scott, earned \$5,000 per month.<sup>60</sup> Mr. Patrick testified that he authorized the filing of the Complaint and the Seery Motion.<sup>61</sup> He testified that he retained the Sbaiti law firm 12 days before the District Court Action was filed, and the idea for filing the Complaint came from that firm,<sup>62</sup> although Mr. Dondero “brought certain information” to Mr. Patrick. Mr. Patrick then “engaged the Sbaiti firm to launch an investigation,” and “also wanted Mr. Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts.”<sup>63</sup> Mr. Patrick elaborated that he had no specific knowledge about the HarbourVest Settlement before taking charge of DAF and CLO Holdco,<sup>64</sup> but Mr. Dondero came to him with information about it.<sup>65</sup> Mr. Patrick did not talk to DAF’s and CLO Holdco’s prior managing member (Grant Scott) about the District Court Action, even though Grant Scott had been the managing member at the time of the HarbourVest Settlement that is the subject of the District Court Action.<sup>66</sup> Mr. Patrick hired the Sbaiti law firm at the unsolicited recommendation of D.C. Sauter,<sup>67</sup> the in-house general counsel of NexPoint

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<sup>59</sup> Transcript 6/8/21 Hearing, at 97:3-21. [DE# 2440].

<sup>60</sup> *Id.* at 132:6-17. *See also* Debtor’s Exh. 24 at 96:2-18 [DE # 2410].

<sup>61</sup> Transcript 6/8/21 Hearing, at 103:10-14; 104:3-13. [DE # 2440].

<sup>62</sup> *Id.* at 104:9-22.

<sup>63</sup> *Id.* at 105:1-5.

<sup>64</sup> *Id.* at 104:17-22.

<sup>65</sup> *Id.* at 105:13-106:16.

<sup>66</sup> Debtor’s Exh. 24 at 101:10-102:20 [DE # 2410]; *see also* Transcript 6/8/21 Hearing, at 108:20-109:22. [DE # 2440].

<sup>67</sup> Transcript 6/8/21 Hearing, at 106:22-107:11. [DE # 2440].

Advisors (a company of which Mr. Dondero is president and controls).<sup>68</sup> Mr. Patrick further testified that Mr. Dondero communicated directly with the Sbaiti firm in relation to the investigation that was being undertaken and he “did not participate in those conversations”;<sup>69</sup> Mr. Patrick “considered Mr. Dondero as the investment advisor to the portfolio . . . I wanted him to participate in the investigation.”<sup>70</sup> Mr. Patrick confirmed that there is no formal investment advisory agreement with Mr. Dondero, and DAF and CLO Holdco had previously been in an investment advisory agreement with Highland.<sup>71</sup> While Mr. Patrick’s testimony was replete with comments that he deferred to the Sbaiti law firm quite a bit, he did confirm that he authorized the filing of the Seery Motion and he was aware of the July 2020 Seery CEO Order.<sup>72</sup>

As for Mr. Dondero, much of the testimony elicited from Mr. Dondero centered around whether he essentially controls DAF and CLO Holdco and the sequence of events that led to Mr. Grant Scott resigning as their managing member. Recall that Mr. Scott had been their managing member at the time of the HarbourVest Settlement—to which CLO Holdco objected and then

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<sup>68</sup> NexPoint Advisors is 99% owned by Mr. Dondero’s family trust, Dugaboy Investment Trust, and is 1% owned by NexPoint Advisors GP, LLC, which is 100% owned by Mr. Dondero. [DE # 2543].

<sup>69</sup> *Id.* at Transcript 6/8/21 Hearing, at 107:24-108:18. [DE # 2440].

<sup>70</sup> *Id.* at 107:18-23.

<sup>71</sup> The lawyers at Sbaiti & Company commented during opening statements that Mr. Dondero was the source of certain of the information in the Complaint and that they were asserting “work product privilege” and “attorney-client privilege” as to their communications with Mr. Dondero “because he’s an agent of our client.” *Id.* at 41:6-10. The court ultimately overruled this claim of privilege since, among other things, Mr. Patrick’s own testimony confirmed that Mr. Dondero had no contractual arrangement of any sort with DAF and CLO Holdco, and he was not a board member and had no decision-making authority for them. *Id.* at 137:2-12; *See also id.* at 180:23-188:7. For purposes of privilege assertion, there was no evidence whatsoever that Mr. Dondero was an agent or representative of DAF and CLO Holdco.

<sup>72</sup> *Id.* at 111:5-112:9.

withdrew its objection.<sup>73</sup> Mr. Dondero testified that he believed Mr. Scott's decision to withdraw the objection to the HarbourVest Settlement was inappropriate.<sup>74</sup>

Mr. Dondero further confirmed that he was the founder and primary donor to DAF.<sup>75</sup> He expressed disapproval for Mr. Scott's various decisions on behalf of DAF and CLO Holdco during the bankruptcy case (such as withdrawing a proof of claim and settling a lawsuit with the Debtor).<sup>76</sup> He testified about general knowledge of the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order.<sup>77</sup> He confirmed that he participated in discussions with Mr. Sbaiti regarding the filing of the Complaint—indicating he spoke with the firm a “[h]alf dozen times, maybe.”<sup>78</sup> He testified that he was not involved with the Seery Motion itself.<sup>79</sup>

The totality of the evidence was clear that Mr. Dondero sparked this fire (*i.e.*, the idea of bringing the District Court Action to essentially re-visit the HarbourVest Settlement and to find a way to challenge Mr. Seery's and the Debtor's conduct), and Mr. Patrick and Sbaiti & Company, PLLC, were happy to take the idea and run with it. The court believes the evidence was clear and convincing that Mr. Dondero encouraged Mr. Patrick to do something wrong, and Mr. Patrick basically abdicated responsibility to Mr. Dondero with regard to dealing with Sbaiti and executing the litigation strategy.

### **Conclusions of Law**

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<sup>73</sup> *Id.* at 163:10-165:18.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 165:19-24.

<sup>76</sup> *Id.* at 161:24-168:1; 169:1-170:9.

<sup>77</sup> *Id.* at 178:16-180:11.

<sup>78</sup> *Id.* at 180:12-22; 207:10-12.

<sup>79</sup> *Id.* at 210:7-14.

A. Jurisdiction and Authority.

Bankruptcy subject matter jurisdiction exists in this matter, pursuant to 28 U.S.C. § 1334(b).

This bankruptcy court has authority to exercise such subject matter jurisdiction, pursuant to 28 U.S.C. § 157(a) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. This is a core matter pursuant to 28 U.S.C. § 157(b) in which this court may issue a final order.

The contempt motion currently before the court seeks for this court to hold DAF, CLO Holdco, Sbaiti & Company, PLLC, and any persons who authorized their actions in civil contempt of court for violating two orders of this court. Mr. Patrick and Mr. Dondero have both responded herein—neither, of course, admitting to any wrongdoing.

It is well established that bankruptcy courts have civil (as opposed to criminal) contempt powers. “The power to impose sanctions for contempt of an order is an inherent and well-settled power of all federal courts—including bankruptcy courts.”<sup>80</sup> A bankruptcy court’s power to sanction those who “flout [its] authority is both necessary and integral” to the court’s performance of its duties.<sup>81</sup> Indeed, without such power, the court would be a “mere board[ ] of arbitration, whose judgments and decrees would be only advisory.”<sup>82</sup>

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<sup>80</sup> *In re SkyPort Global Comm’s, Inc.*, No. 08-36737-H4-11, 2013 WL 4046397, at \*1 (Bankr. S.D.Tex. Aug. 7, 2013), aff’d, 661 Fed. Appx. 835 (5th Cir. 2016); see also *In re Bradley*, 588 F.3d 254, 255 (5th Cir. 2009) (noting that “civil contempt remains a creature of inherent power[,]” to “prevent insults, oppression, and experimentation with disobedience of the law[,]” and it is “widely recognized” that contempt power extends to bankruptcy) (quoting 11 U.S.C. § 105(a), which states, in pertinent part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc.* (*In re Terrebonne Fuel & Lube, Inc.*), 108 F.3d 609, 613 (5th Cir. 1997) (“[W]e assent with the majority of the circuits ... and find that a bankruptcy court’s power to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in 11 U.S.C. § 105.”); *Citizens Bank & Trust o. v. Case* (*In re Case*), 937 F.2d 1014, 1023 (5th Cir. 1991) (held that bankruptcy courts, as Article I as opposed to Article III courts, have the inherent power to sanction and police their dockets with respect to misconduct).

<sup>81</sup> *SkyPort Global*, 2013 WL 4046397, at \*1.

<sup>82</sup> *Id.* (internal quotations omitted); see also *Bradley*, 588 F.3d at 266 (noting that contempt orders are both necessary and appropriate where a party violates an order for injunctive relief, noting such orders “are important to the

Contempt is characterized as either civil or criminal depending upon its “primary purpose.”<sup>83</sup> If the purpose of the sanction is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal. If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor’s violation, the order is considered purely civil.<sup>84</sup> It is clear that Highland’s intent is to both seek compensation for the expenses incurred by Highland, due to the Alleged Contemnors’ purported violations of the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order (*i.e.*, the gatekeeper provisions therein), and to coerce compliance going forward.

B. Type of Civil Contempt: Alleged Violation of a Court Order.

There are different types of civil contempt, but the most common type is violation of a court order (such as is alleged here). “A party commits contempt when [they] violate[] a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court's order.”<sup>85</sup> Thus, the party seeking an order of contempt in a civil contempt proceeding need only establish, by clear and convincing evidence:<sup>86</sup> “(1) that a court order was in effect, and (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order.”<sup>87</sup>

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management of bankruptcy cases, but have little effect if parties can irremediably defy them before they formally go into effect.”).

<sup>83</sup> *Bradley*, 588 F.3d at 263.

<sup>84</sup> *Id.* (internal citations omitted).

<sup>85</sup> *Travelhost*, 68 F.3d at 961.

<sup>86</sup> *United States v. Puente*, 558 F. App’x 338, 341 (5th Cir. 2013) (per curiam) (internal citation omitted) (“[C]ivil contempt orders must satisfy the clear and convincing evidence standard, while criminal contempt orders must be established beyond a reasonable doubt.”).

<sup>87</sup> *F.D.I.C. v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995); *see also Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992) (same); *Travelhost*, 68 F.3d at 961 (same).

C. Specificity of the Order.

To support a contempt finding in the context of an order alleged to have been violated, the order must delineate ‘definite and specific’ mandates that the defendants violated.”<sup>88</sup> The court need not, however, “anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated.”<sup>89</sup>

D. Possible Sanctions.

To be clear, if the court ultimately determines that the Alleged Contemnors are in contempt of court, for not having complied with the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order, the court can order what is necessary to: (1) compel or coerce obedience of the order; and (2) to compensate the Debtor/estate for losses resulting from the Alleged Contemnors’ non-compliance with the court orders.<sup>90</sup> The court must determine that the Debtor/movant showed by clear and convincing evidence that: (1) the orders were in effect; (2) the orders required or prohibited certain conduct; and (3) that the Alleged Contemnors failed to comply with the orders.<sup>91</sup> “[T]he factors to be considered in imposing civil contempt sanctions are: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order.”<sup>92</sup> “Compensatory civil contempt reimburses the injured party for

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<sup>88</sup> *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000) (citing Fed. R. Civ. P. 65).

<sup>89</sup> *Id.*

<sup>90</sup> *In re Gervin*, 337 B.R. 854, 858 (W.D. Tex. 2005) (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)).

<sup>91</sup> *In re LATCL&F, Inc.*, 2001 WL 984912, at \*3 (N.D. Tex. 2001) (citing to *Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 400 (5th Cir. 1987)).

<sup>92</sup> *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 567 (5th Cir. 1990) (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)).

the losses and expenses incurred because of [their] adversary's noncompliance.”<sup>93</sup> Ultimately, courts have “broad discretion in the assessment of damages in a civil contempt proceeding.”<sup>94</sup>

**E. Knowledge of the Order.**

“An alleged contemnor must have had knowledge of the order on which civil contempt is to be based. The level of knowledge required, however, is not high. And intent or good faith is irrelevant.”<sup>95</sup> To be clear, “intent is not an element in civil contempt matters. Instead, the basic rule is that all orders and judgments of courts must be complied with promptly.”<sup>96</sup>

**F. Willfulness of Actions.**

For civil contempt of a court order to be found, “[t]he contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order.”<sup>97</sup> For a stay violation, the complaining party need not show that the contemnor intended to violate the stay. Rather, the complaining party must show that the contemnor intentionally committed the acts which violate the stay. Nevertheless, in determining whether damages should be awarded under the court's contempt powers, the court considers whether the contemnor's conduct constitutes a willful violation of the stay.<sup>98</sup>

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<sup>93</sup> *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976); see also *Travelhost*, 68 F.3d at 961 (noting that “[b]ecause the contempt order in the present case is intended to compensate [plaintiff] for lost profits and attorneys' fees resulting from the contemptuous conduct, it is clearly compensatory in nature.”); *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 613 (affirming court's decision to impose sanctions for violating injunction and awarding plaintiff costs and fees incurred in connection with prosecuting defendant's conduct); *F.D.I.C.*, 43 F.3d at 168 (affirming court's imposition of sanctions requiring defendant to pay movant attorneys' fees).

<sup>94</sup> *Am. Airlines*, 228 F.3d at 585; see also *F.D.I.C.*, 43 F.3d at 168 (reviewing lower court's contempt order for “abuse of discretion” under the “clearly erroneous standard.”); *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 613 (“The bankruptcy court's decision to impose sanctions is discretionary[]”).

<sup>95</sup> *Kellogg v. Chester*, 71 B.R. at 38.

<sup>96</sup> *In re Unclaimed Freight of Monroe, Inc.*, 244 B.R. 358, 366 (Bankr. W.D. La. 1999); see also *In re Norris*, 192 B.R. 863, 873 (Bankr. W.D. La. 1995) (“Intent is not an element of civil contempt.”)

<sup>97</sup> *Am. Airlines*, 228 F.3d at 581 (citing *N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir. 1984)).

<sup>98</sup> *In re All Trac Transport, Inc.*, 306 B.R. 859, 875 (Bankr. N.D. Tex. 2004) (internal citations omitted).

G. Applying the Evidence to the Literal Terms of the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order.

The court concludes that there is clear and convincing evidence that DAF, CLO Holdco, Sbaiti & Company, PLLC (through attorneys Mazin Sbaiti and Jonathan Bridges), Mr. Patrick, and Mr. Dondero—each and every one of them, with their collaborative actions—violated the specific wording of the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order, and all are in contempt of the bankruptcy court. The evidence was clear and convincing: (1) that two court orders were in effect (the January 2020 Corporate Governance Order and the July 2020 Seery CEO Order); (2) that the orders prohibited certain conduct (*i.e.*, “[n]o entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim.”);<sup>99</sup> and (3) that the all of the Alleged Contemnors (DAF, CLO Holdco, Sbaiti & Company, PLLC, Mr. Mazin Sbaiti, Mr. Jonathan Bridges, Mr. Patrick, and Mr. Dondero) knew about the orders and failed to comply with the court's orders.

As earlier noted, the District Court Action is all about Mr. Seery's allegedly deceitful conduct in connection with a bankruptcy court-approved settlement (*i.e.*, the HarbourVest Settlement), to which CLO Holdco objected, but then withdrew its objection the day of the hearing. ***The lawsuit is, from this court's estimation, wholly frivolous.*** This court is in a better position to realize its frivolousness than any other—having spent hours reflecting on the merits of the HarbourVest Settlement. This court believes that it is clear and convincing that each of the Alleged

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<sup>99</sup> This is quoting from the July 2020 Seery CEO Order. The January 2020 Corporate Governance Order, of course, had the same prohibitory language as to all three of the Independent Directors.

Contemnors knew that it would be a “hard sell” to convince this bankruptcy court that the District Court Action and the claims against Mr. Seery should be allowed to go forward. That’s why they tried their luck with the District Court—concocting a rationale that their methods were proper since the bankruptcy court’s power to exercise bankruptcy subject matter is derivative, by statute, from the District Court. This rationale is nothing more than thinly veiled forum shopping. But worse, it is, in this instance, contempt of court. The Alleged Contemnors argue that they should not be held in contempt because, in filing the Complaint (which mentions Mr. Seery 50 times—but merely names him as a “potential party”), they did not “commence or pursue” a claim against Mr. Seery. Likewise, they argue that, in filing the Seery Motion, they did not actually “commence or pursue” a claim against Mr. Seery. They argue that a request for leave from the District Court, to add him to the District Court Action, cannot possibly meet the definition of “pursue”—and that one can only “pursue” litigation against a party *after* “commencing” an action against the party. This is linguistic gymnastics that does not fly. The Alleged Contemnors were pursuing litigation when they filed the Seery Motion in the District Court (and maybe even as early as when they filed the Complaint mentioning Mr. Seery 50 times and describing him as a “potential party”). These were all sharp litigation tactics, to be sure, but more problematic, were contemptuous of this court’s orders.

## V. Damages.

The Contempt Motion requests that the court: (a) find and hold each of the Alleged Contemnors (directed at DAF, CLO Holdco, Sbaiti & Company, PLLC, and any persons who actually authorized their acts—*i.e.*, “Authorizing Persons”) in contempt of court; (b) direct the Alleged Contemnors, jointly and severally, to pay the Debtor’s estate an amount of money equal to two times the Debtor’s actual expenses incurred in bringing this contempt matter, payable within three calendar days of presentment of an itemized list of expenses; (c) impose a penalty of three

times the Debtor's actual expenses incurred in connection with any future violation of any order of this court; and (d) grant the Debtor such other and further relief as the court deems just and proper under the circumstances.<sup>100</sup>

As indicated earlier, the court can order what is necessary to: (1) compel or coerce obedience of an order; and (2) to compensate the Debtor/estate for losses resulting from non-compliance with a court order. Here, the court believes compensatory damages are more appropriate than a remedy to compel or coerce future compliance. Compensatory damages are supposed to reimburse the injured party for the losses and expenses incurred because of their adversary's noncompliance. Courts have broad discretion but may consider such factors as: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order.

As far as the harm from noncompliance, the Debtor presented invoices of the fees incurred by its counsel relating to this matter. The invoices were Exhibits 54 & 55 [DE # 2421]. The invoices reflect fees of the Debtor's primary bankruptcy counsel, Pachulski Stang, relating to this contempt matter, during the time period of April 18–April 30, 2021, of \$38,796.50,<sup>101</sup> and another \$148,998.50,<sup>102</sup> during the time period of May 1–June 7, 2021. These total \$187,795, and the court determines these to have been reasonable and necessary fees incurred in having to respond and react to the contemptuous conduct set forth herein. Moreover, the court considers it to likely be a

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<sup>100</sup> Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders. [DE # 2247].

<sup>101</sup> The total fees and expenses for this time period were \$1,295,070.58, but the court has calculated the fees related to this contempt matter.

<sup>102</sup> The total fees and expenses for this time period were \$1,465,010 but the court has calculated the fees related to this contempt matter.

conservative number because: (a) it does not reflect the fees and expenses incurred at the June 8, 2021 Hearing (which went 4+ hours); (b) it does not include any expenses the firm incurred (the court notes from the time entries that there were depositions taken—thus, there must have been expenses); (c) it does not include any fees and expenses that the UCC may have incurred monitoring this contested matter; and (d) it does not include any fees for Pachulski's local counsel (Hayward & Associates). As for the June 8, 2021 Hearing, the court is aware that at least three professionals from Pachulski Stang participated (Jeff Pomeranz at \$1,295/hour; John Morris at \$1,245/hour; and paralegal Asia Canty at \$425/hour, for a total of \$2,965/hour; multiplied by 4 hours equals \$11,860)—thus, the court will add on another \$11,860 of fees that should be reimbursed. The expenses the Pachulski firm incurred during this time period were \$22,271.14, but they are not itemized. Thus, the court will assume \$10,000 of this related to the contempt matter. The court will conservatively assume the UCC incurred \$20,000 in fees monitoring this matter—as this matter could impact their constituency's recovery (the court is aware that the UCC's lawyer Matthew Clemente attended the June 8, 2021 Hearing). The court will conservatively assume that Hayward and Associates incurred \$10,000 in fees assisting Pachulski. Thus, all totaled, this amounts to \$239,655 of fees and expenses that this court is imposing upon the Alleged Contemnors, jointly and severally, to reimburse the bankruptcy estate for the fees and expenses it has incurred relating to their contemptuous acts.

The Debtor has asked for the court to impose a penalty of three times the Debtor's actual expenses incurred in connection with any future violation of any order of this bankruptcy court. The court declines to do this. However, the court will add on a sanction of \$100,000 for each level of rehearing, appeal, or petition for *certiorari* that the Alleged Contemnors may choose to take

with regard to this Order, to the extent any such motions for rehearing, appeals, or petitions for certiorari are not successful.

Accordingly, it is hereby ORDERED that:

- (i) DAF, CLO Holdco, Sbaiti & Company, PLLC (including Mazin Sbaiti and Jonathan Bridges), Mark Patrick, and James Dondero (collectively, now the “Contemnors”) are each in civil contempt of court in having violated the court’s January 2020 Corporate Governance Order and July 2020 Seery CEO Order—the court having found by clear and convincing evidence that: (1) these orders were in effect and each of the Contemnors knew about them; (2) the orders prohibited certain conduct; and (3) the Contemnors failed to comply with the orders;
- (ii) In order to compensate the Debtor’s estate for loss and expense resulting from the Contemnors’ non-compliance with the orders, the Contemnors are jointly and severally liable for the compensatory sum of \$239,655 and are directed to pay the Debtor (on the 15<sup>th</sup> day after entry of this order) an amount of money equal to \$239,655;
- (iii) The court will add on a monetary sanction of \$100,000 for each level of rehearing, appeal, or petition for *certiorari* that the Contemnors may choose to take with regard to this Order, to the extent that any such motions for rehearing, appeals, or petitions for *certiorari* are pursued by any of them and are not successful;
- (iv) Other sanctions (such as further deterrence sanctions) are denied at this time but, *should any of these Contemnors be subject to another contempt motion in this court in the future and be found to have committed contempt*, the court anticipates imposing significant deterrence sanctions (the court duly notes that this is the second

time in the last several weeks that the court has found Mr. Dondero to be in contempt of court); and

- (v) The court reserves jurisdiction to interpret and enforce this Order.

### End of Memorandum Opinion and Order ###

# TAB B

1 IN THE UNITED STATES BANKRUPTCY COURT  
2 FOR THE NORTHERN DISTRICT OF TEXAS  
3 DALLAS DIVISION

4 In Re: ) **Case No. 19-34054-sgj-11**  
5 HIGHLAND CAPITAL ) Chapter 11  
6 MANAGEMENT, L.P., )  
7 Debtor. ) Dallas, Texas  
8 ) Tuesday, June 8, 2021  
9 ) 9:30 a.m. Docket  
10 )  
11 ) - SHOW CAUSE HEARING (2255)  
12 ) - MOTION TO MODIFY ORDER  
13 ) AUTHORIZING RETENTION OF  
14 ) JAMES SEERY (2248)  
15 ) - MOTION FOR ORDER FURTHER  
16 ) EXTENDING THE PERIOD WITHIN  
17 ) WHICH DEBTOR MAY REMOVE  
18 ) ACTIONS (2304)  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )

11 TRANSCRIPT OF PROCEEDINGS  
12 BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
13 UNITED STATES BANKRUPTCY JUDGE.

14 APPEARANCES:

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Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1                   DALLAS, TEXAS - JUNE 8, 2021 - 9:30 A.M.

2                   THE COURT: All right. We have settings in Highland  
3 this morning. We have three settings. We have the show cause  
4 hearing with regard to a lawsuit filed in the District Court.  
5 We have a couple of more, I would say, ministerial matters,  
6 although I think we do have objections. I know we have  
7 objections. We have a motion to extend the removal period in  
8 this case as well as a motion to modify the order authorizing  
9 Mr. Seery's retention.

10                  So let's go ahead and start out by getting appearances  
11 from the lawyers who are participating today. I'll get those  
12 now.

13                  MR. MORRIS: Good morning, Your Honor.

14                  THE COURT: Good morning.

15                  MR. MORRIS: John Morris from Pachulski, Stang, Ziehl  
16 & Jones for the Debtor. I'm joined with me this morning by my  
17 colleagues, Jeffrey Pomerantz, Greg Demo, and Zachery Annable.

18                  THE COURT: Okay.

19                  MR. MORRIS: We do have a proposal on how to proceed  
20 today, a substantial portion of which is in agreement with the  
21 Respondents.

22                  THE COURT: Okay.

23                  MR. MORRIS: So, at the appropriate time, I'd be  
24 happy to present that to the Court.

25                  THE COURT: All right. Well, let's get all the

1 appearances and then I'll hear from you on that.

2 MR. SBAITI: Your Honor, my name is -- would you like  
3 me to approach, Your Honor?

4 THE COURT: Yes, please.

5 MR. SBAITI: It's my first time appearing in  
6 Bankruptcy Court, Your Honor. My name is Mazin Sbaiti. I'm  
7 here on behalf of the charitable DAF Fund, CLO Holdco, and the  
8 Respondents to the show cause hearing. We are also  
9 representing them as the Movants on the motion to modify the  
10 Court's order appointing Mr. Seery.

11 THE COURT: All right. Thank you.

12 MR. BRIDGES: Jonathan Bridges, Your Honor, with Mr.  
13 Sbaiti, also representing the Charitable DAF and CLO Holdco,  
14 as well as our firm that is named in the show cause order.

15 THE COURT: Okay.

16 MR. BRIDGES: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. PHILLIPS: Good morning, Your Honor. Louis M.  
19 Phillips from Kelly Hart Hallman here on behalf of Mark  
20 Patrick in the show cause matter. I'm joined with my  
21 colleague Michael Anderson from the Kelly Hart firm here in  
22 Fort Worth. And that's the matter that we're involved in, the  
23 show cause auction.

24 THE COURT: All right. Thank you, Mr. Phillips.

25 MR. TAYLOR: Good morning, Your Honor. Clay Taylor

1 of Bonds Ellis Eppich Schafer Jones here on behalf of Jim  
2 Dondero. I have Mr. Will Howell here with me from my firm.

3 THE COURT: All right. Thank you.

4 MR. CLEMENTE: Good morning, Your Honor. Matthew  
5 Clemente from Sidley Austin on behalf of the Committee. I'm  
6 here with my partner, Paige Montgomery.

7 THE COURT: Okay. Thank you.

8 MR. CLEMENTE: Good morning.

9 THE COURT: All right. Just to remind people, we do  
10 have participants on the WebEx, but in setting the hearing I  
11 made clear that participants today needed to be here live in  
12 the courtroom. So the WebEx participants are going to be only  
13 observers.

14 We have a camera on the screen here that is poised to  
15 capture both the lawyer podium as well as the witness box, and  
16 then another camera on the bench.

17 So, please be mindful. We want the lawyers to speak from  
18 the podium so that they are captured and heard by the WebEx.  
19 And so hopefully we don't have any cords you will trip over.  
20 We've worked hard to make it easy to maneuver around the  
21 courtroom.

22 All right. So, Mr. Morris, you had a proposal on how we  
23 would approach this today?

24 MR. MORRIS: I do, Your Honor. And it's rather  
25 brief, but I think it makes a lot of sense.

1           There are three motions on the calendar for today, --

2           THE COURT: Uh-huh.

3           MR. MORRIS: -- only one of which required the  
4 personal appearance of certain parties.

5           THE COURT: Uh-huh.

6           MR. MORRIS: And for that reason, and because,  
7 frankly, it was the first of the three motions filed, we  
8 believe that that ought to go first.

9           THE COURT: Okay.

10          MR. MORRIS: And then it can be followed by the  
11 motion for reconsideration of the July order, assuming time  
12 permits, and then the motion to extend the removal deadline.

13          And with respect to the contempt motion, Your Honor, the  
14 parties have agreed that each side shall have a maximum of  
15 three hours to make opening statements, closing arguments,  
16 direct and cross-examination of witnesses.

17          You know, I did point out to them that from time to time  
18 Your Honor has used the Court's discretion to adjust the time  
19 --

20          THE COURT: Uh-huh.

21          MR. MORRIS: -- if the Court is making inquiries, and  
22 I guess we'll deal with that matter as it comes. But as a  
23 general matter, that is what we've agreed to. And I would  
24 propose that, unless anybody has any objections, that we just  
25 proceed on that basis.

1 THE COURT: Okay.

2 MR. MORRIS: And I could -- I could go right forward.

3 THE COURT: So, three hours in the aggregate?

4 MR. MORRIS: Uh-huh.

5 THE COURT: It doesn't matter how people spend it --  
6 with argument, examination, cross -- three hours in the  
7 aggregate?

8 MR. MORRIS: Correct.

9 THE COURT: Okay. So, Nate, you'll be the timer on  
10 that.

11 MR. MORRIS: Yeah. We thought it was very important  
12 to get this done today, with people coming in from out of  
13 town.

14 THE COURT: Okay. Sounds fine.

15 MR. MORRIS: So does the Court want to inquire if  
16 anybody has any questions or comments?

17 THE COURT: I do. Well, I see Mr. Bridges getting  
18 up. You confirm that that's agreeable?

19 MR. BRIDGES: Thank you, Your Honor. Yes, that's  
20 agreeable. We have one slight difference in our proposal. We  
21 would suggest to Your Honor that the motion for modification,  
22 if Your Honor decides our way, would moot the entire motion  
23 for contempt. And we'd suggest, if that possibility is  
24 realistic, that we would go first with that motion, perhaps  
25 obviate having to have the evidence presented and the lengthy

1 hearing.

2         The motion for modification, Your Honor, asks the Court to  
3 reconsider -- to modify that order because of jurisdictional  
4 and other shortcomings in it that make the order  
5 unenforceable. And because that's the order that is the  
6 subject of the contempt motion, we'd ask Your Honor to  
7 consider putting that motion first.

8             THE COURT: Okay. Or second? Ahead of the contempt  
9 matter?

10            MR. BRIDGES: Ahead of the contempt matter, --

11            THE COURT: Uh-huh.

12            MR. BRIDGES: -- because it has a possibility --

13            THE COURT: We have the removal matter, which I think  
14 is the shortest. All right.

15            MR. BRIDGES: No objection to that, Your Honor.

16 That's correct.

17            THE COURT: Okay. So, Mr. Morris, that's fine by  
18 you?

19            MR. MORRIS: Your Honor, that doesn't make a lot of  
20 sense to us. We don't believe there's any basis for the Court  
21 to reconsider, modify, or amend in any way the July order.  
22 But even if we were wrong about that, that would not  
23 retroactively validate conduct which was otherwise wrongful at  
24 the time it was committed.

25            The contempt motion needs to go first. The other motion

1 will have no impact on whether or not there is a finding of  
2 contempt of court.

3 THE COURT: All right. And update me on this. There  
4 was something filed yesterday, a notice of a proposed form of  
5 order that the Debtor had proposed, that I think was not  
6 agreed to, where there would be a change about any action that  
7 goes forward, the cause of action would be in the sole  
8 jurisdiction of the Court, and you all agreed to change that  
9 part of the order, correct?

10 MR. MORRIS: So, just as a division of labor for Your  
11 Honor, I'm doing the contempt motion.

12 THE COURT: Okay. That's Mr. Pomerantz's?

13 MR. MORRIS: Mr. Pomerantz is going to take care of  
14 that.

15 MR. POMERANTZ: Yes, Your Honor. Good morning. Good  
16 to see you again.

17 THE COURT: Good to see you.

18 MR. POMERANTZ: Yes, Your Honor, that's correct. If  
19 Your Honor recalls, there's really three aspects of the  
20 January 9th and the July 16th order. First, requiring people  
21 to come to Bankruptcy Court before commencing or pursuing an  
22 action. Second, for the Bankruptcy Court to have the sole and  
23 exclusive authority to determine whether the claim is a  
24 colorable claim of willful negligence or gross misconduct.  
25 And then third, if Your Honor passed the claim through the

1 gate, whether you would have jurisdiction.

2 In Your Honor's January 9th and July 16th orders, you said  
3 you would have exclusive jurisdiction. In the motion for  
4 reconsideration, and particularly the reply, Movants said, if  
5 you just change that and say that if passes through the gate  
6 that you'd have jurisdiction only to the extent you would  
7 otherwise have it, that would resolve the motion, in the same  
8 way that the plan of reorganization was amended.

9 We proposed that. They rejected it. We put it before  
10 Your Honor. So we believe that it moots out a good portion --  
11 actually, we think it should moot out the entire motion. They  
12 obviously disagree. But we definitely agree it moots out the  
13 most significant portion of their motion, which is that Your  
14 Honor would take jurisdiction to adjudicate a matter on an  
15 exclusive basis when you might not otherwise have jurisdiction  
16 on an exclusive basis.

17 THE COURT: Okay. Well, --

18 MR. BRIDGES: Your Honor, may I respond to that?

19 THE COURT: You may. And --

20 MR. BRIDGES: Thank you, Your Honor.

21 THE COURT: -- why -- could you clarify why you think  
22 it would moot out the entire show cause matter? I wouldn't be  
23 retroactively changing my order. Is that what you're  
24 proposing?

25 MR. BRIDGES: Your Honor, with all respect, we

1 believe the order is defective and unenforceable and has to be  
2 modified in order to fix it. And because of the defects,  
3 we're -- we're actually arguing, Your Honor, that it is  
4 unenforceable in a contempt proceeding. That is exactly what  
5 our argument is.

6 THE COURT: Okay. I think I'm getting way farther  
7 down this road than maybe I want to right now. But I guess  
8 here's the elephant in the room, I feel like: *Republic Supply*  
9 *versus Shoaf*.

10 MR. BRIDGES: Uh-huh.

11 THE COURT: The U.S. Supreme Court *Espinosa* case, for  
12 that matter. If I accept your argument that maybe there was a  
13 flaw in those orders, that maybe they went too far, don't you  
14 have a problem with those two cases?

15 MR. BRIDGES: Your --

16 THE COURT: The orders weren't appealed.

17 MR. BRIDGES: I understand completely, Your Honor.

18 THE COURT: Uh-huh.

19 MR. BRIDGES: And I think the answer is no because of  
20 the *Applewood* case from the Fifth Circuit. The *Applewood* case  
21 cited in our reply brief explains that in order for an order,  
22 a final order of the Bankruptcy Court to have exculpatory  
23 effect, in order for it to release claims, for example, that  
24 the claims at issue must be enumerated in the order. It's not  
25 enough to have a blanket statement like the order, the July

1 order has, like the January order has, saying that Mr. Seery's  
2 claims -- claims cannot be brought against him for ordinary  
3 negligence at all. The -- Your Honor, we're delving into my  
4 argument.

5 THE COURT: Okay.

6 MR. BRIDGES: And I was hoping to do this on a  
7 preliminary basis.

8 THE COURT: Right.

9 MR. BRIDGES: I don't mean to bog you down with that.  
10 But Your Honor, no, mandatory authority from the Fifth Circuit  
11 after *Shoaf* limits *Shoaf's* application and says that it does  
12 not extinguish the claims that are not specifically enumerated  
13 in the order. And the reason for that is because it doesn't  
14 give the kind of notice to the parties that they would need to  
15 make an appearance and object to those orders at the time. It  
16 actually helps to stem the amount of litigation at the time  
17 rather than to encourage it.

18 THE COURT: All right. Well, you'll get your  
19 opportunity to make your full argument on this. But I'm not  
20 convinced, preliminarily, at least, to affect my decision on  
21 the sequence, okay? So even if it potentially wastes time  
22 under your view of the law, I am going to do the removal  
23 matter first -- the extension of time request, I should say --  
24 and then the show cause and then the motion to modify. And I  
25 realize, those last two matters, everything is kind of

1 interrelated. All right?

2 MR. BRIDGES: Yes, Your Honor.

3 THE COURT: All right. So, with that decided, is  
4 there a desire on the part of the lawyers to make opening  
5 statements, or shall we just go to the motions? And, of  
6 course, people can use their three hours for oral argument,  
7 however much they want to use for oral argument.

8 MR. MORRIS: Your Honor, the -- to be clear, the six-  
9 hour time limit only applies to the contempt proceeding.

10 THE COURT: Oh, yes. Yes. Uh-huh.

11 MR. MORRIS: And I do want to make an opening  
12 statement.

13 THE COURT: Okay.

14 MR. MORRIS: So, as the Movant, I'd like to go first.

15 THE COURT: You want to make opening statements?

16 MR. BRIDGES: Yes. Yes, Your Honor.

17 THE COURT: Okay. Okay.

18 MR. BRIDGES: I believe we've got a PowerPoint  
19 prepared that I think can lay out our side of it.

20 THE COURT: Okay.

21 MR. BRIDGES: I don't think we're participating in  
22 the motion to extend the removal time.

23 THE COURT: Okay.

24 MR. BRIDGES: That's going first.

25 THE COURT: All right.

1                   MR. BRIDGES: So we'll wait until that is --  
2                   THE COURT: Well, so we don't get confused on the  
3 timing, let's just do the motion to extend right now. And I  
4 think we only had one objection. As Mr. Sbaiti just pointed  
5 out, they're not objecting on that one. We have a Dondero  
6 objection. So let's, without starting the timer, hear that  
7 one. Okay?

8                   MR. DEMO: Good morning, Your Honor. Greg Demo;  
9 Pachulski, Stang, Ziehl & Jones.

10                  THE COURT: Good morning.

11                  MR. DEMO: I'll be arguing the removal motion and  
12 then turn it over.

13                  It's fairly basic and straightforward, Your Honor. We're  
14 asking for a further extension of the statutory deadline to  
15 remove cases until December 14th, 2021. The deadline is  
16 procedural only. As Your Honor is well aware, there's a lot  
17 of moving parts in this case. You know, we don't know to this  
18 date, really, the full universe of what could actually be out  
19 there. So we're just asking for a short extension of the  
20 removal period to cover through December.

21                  I know that there was an objection from Mr. Dondero. I  
22 know that he argues that 9006 does not allow us to extend that  
23 deadline past the effective date of the plan, and he cites one  
24 case for that purpose, which is *Health Support*. I think it's  
25 out of Florida. That case dealt with the extension of the

1 two-year extension of the statute of limitations and was very  
2 clear that you can't use 9 --

3 THE COURT: You mean the 546 deadline?

4 MR. BRIDGES: Yes. Yes.

5 THE COURT: Okay.

6 MR. BRIDGES: That you can't use 9006 to extend non-  
7 bankruptcy deadlines. That's not what we're doing here, Your  
8 Honor. We're using 9006 to extend the bankruptcy deadline to  
9 remove the cases.

10 THE COURT: Uh-huh.

11 MR. DEMO: And we'd just ask Your Honor for the  
12 extension through December.

13 THE COURT: Okay. I'll hear Mr. Dondero's counsel.

14 MR. HOWELL: Good morning, Judge. Will Howell for  
15 Mr. Dondero.

16 So, the argument here is not that the Court can't do this.  
17 I was just pointing that there is an outside limit to what  
18 we're doing. And so if you look at the cases that the Debtor  
19 cites in support of this motion, the one that is most apt was  
20 when Judge Nelms did a fourth extension of time. But those  
21 were all 90-day extensions. Here, we're in a situation where  
22 the Debtor is asking for a fourth 180-day extension of time,  
23 and this is really where the, you know, objection came -- or,  
24 the response in opposition came from. They specifically asked  
25 that it be without prejudice to further extensions.

1       And so, at some point, you know, does 9006 have an outside  
2 limit? You know, do we need to see some sort of a light at  
3 the end of the tunnel here?

4       So we would ask that the motion, at a minimum, be denied  
5 in part with respect to this open-ended request for extension  
6 beyond two years for a 90-day period. The other cases that  
7 they cite, they have one extension here, one extension there,  
8 120 days here, but not 180 days after 180 days after 180 days,  
9 and then asking specifically for without prejudice to further  
10 extensions beyond two years. So that's -- that's where this  
11 comes from.

12           THE COURT: All right. Do you think it matters that  
13 this is a very complex case?

14           MR. BRIDGES: I --

15           THE COURT: There's litigation here, there, and  
16 everywhere.

17           MR. HOWELL: I also think, you know, *Mirant* was  
18 complex. I think *Pilgrim's Pride* was complex. I think, you  
19 know, it is not out of bounds for the Court to grant a fourth  
20 extension.

21           THE COURT: Uh-huh.

22           MR. BRIDGES: But to -- you know, at some point --  
23 you know, maybe the Court could grant a 90-day extension and  
24 make them come back a little more frequently to kind of corral  
25 this thing, rather than just saying "This grant of 180 days,

1 the fourth time, is going to be without prejudice to further  
2 extensions." It just gets kind of large.

3 THE COURT: Okay. Mr. Demo, your motion. You get  
4 the last word.

5 MR. DEMO: Your Honor, I mean, it is without  
6 prejudice for further extensions, but that doesn't mean that  
7 Your Honor is granting the further extensions now. It means  
8 we'll have to come back. We'll have to make our case for why  
9 an extension is necessary. And, you know, if Your Honor  
10 doesn't want to give us another extension past December 2021,  
11 Your Honor doesn't have to. This is not an order saying that  
12 it's a limitless grant.

13 You know, I'd also ask, you know, quite honestly, why Mr.  
14 Dondero has such an issue with this. He hasn't said that any  
15 of these cases involve him. He hasn't given any reasons why  
16 this affects him. He hasn't given any reason why this damages  
17 him at all. So I do, I guess, wonder as an initial matter  
18 kind of why we're here, you know, why we're responding to Mr.  
19 Dondero's request, when that request really has no impact on  
20 him.

21 And then, Your Honor, to the extent that you are inclined  
22 to limit this, I would say, you know, we would ask for a  
23 reasonable extension of time. We do think an extension of  
24 time, because of the complexity of this case, through December  
25 is warranted. But if Your Honor for some reason does agree

1 that a shorter extension is necessary under 9006 -- I don't  
2 think it is -- we'd just ask that Your Honor grant us leave to  
3 come back for further extensions of time.

4 THE COURT: Okay. All right. I will -- I'll grant a  
5 90-day extension, without prejudice for further extensions.

6 MR. DEMO: Thank you, Your Honor.

7 THE COURT: Maybe in 90 days we'll be farther down  
8 the road and we won't need any more extensions, but you'll  
9 have the ability to argue for more if you think it's really  
10 necessary. All right. So that will bring us to around  
11 September 14th, I guess.

12 All right. Well, let's go ahead and hear opening  
13 statements with regard to the show cause matter. And again,  
14 if you want to roll in arguments about the -- well, no, you  
15 said the six hours only applies to show cause, so we'll not  
16 hear opening statements with regard to the Seery retention  
17 modification, just show cause.

18 MR. MORRIS: All right. Before I begin, Your Honor,  
19 I have a small deck to guide --

20 THE COURT: Okay.

21 MR. MORRIS: -- to guide my opening statement.

22 THE COURT: All right.

23 MR. MORRIS: Can I approach the bench?

24 THE COURT: You may. And is your legal assistant  
25 going to share her content --

1 MR. MORRIS: Yes.

2 THE COURT: -- so people on the WebEx will see?

3 Okay.

4 MR. MORRIS: That's the intention, Your Honor.

5 THE COURT: Okay.

6 MR. MORRIS: All right. Are you ready for me to  
7 proceed?

8 THE COURT: I am. And obviously, everyone has a  
9 copy?

10 MR. MORRIS: Yes.

11 THE COURT: Your opponents have a copy of this?

12 MR. MORRIS: Yep.

13 THE COURT: Okay. Although we hope to see it on the  
14 screen.

15 OPENING STATEMENT ON BEHALF OF THE DEBTOR

16 MR. MORRIS: Good morning, Your Honor. John Morris;  
17 Pachulski, Stang, Ziehl & Jones; for the Debtor.

18 We're here today on the Debtor's motion to hold certain  
19 entities and individuals in contempt of court for violating a  
20 very clear and specific court order. I hope to be relatively  
21 brief in my opening here, Your Honor, and I'd like to begin  
22 where I think we must, and that is, how do we -- how do we  
23 prove this and what do we have to prove?

24 The elements of a claim for contempt of court are really  
25 rather straightforward. The Movant must establish by clear

1 and convincing evidence three things.

2 THE COURT: Let me stop you and stop the clock.

3 We're not seeing the shared content.

4 MR. MORRIS: Uh-huh.

5 THE COURT: Did you want her to go ahead and share  
6 her content?

7 MR. MORRIS: I did.

8 THE COURT: Okay.

9 MR. MORRIS: I was hoping that she'd do that.

10 THE COURT: All right. It says it's receiving  
11 content.

12 MR. MORRIS: There we go. It's on my screen, anyway.

13 THE COURT: Oh, here it is. I don't know why it's  
14 not on my Polycom. Can you all see it out there?

15 (Chorus of affirmative replies.)

16 THE COURT: Okay. Very good.

17 MR. MORRIS: Okay.

18 THE COURT: You may proceed.

19 MR. MORRIS: Thank you, Your Honor.

20 So, there's three elements to the cause of action for  
21 contempt, for civil contempt. We have to prove by clear and  
22 convincing evidence that a court order was in effect; that the  
23 order required certain conduct by the Respondents; and that  
24 the Respondent failed to comply with the Court's order.

25 We've cited in the footnote the applicable case law from

1 the Fifth Circuit, and I don't believe that there's any  
2 dispute that is indeed the legal standard.

3 The intent of the Respondents as to liability is  
4 completely irrelevant. It doesn't matter if they thought they  
5 were doing the right thing. It doesn't matter if they  
6 believed in their heart of hearts that the court order was  
7 invalid. These are the three elements, and we will be able to  
8 establish these elements not by clear and convincing evidence,  
9 but if we ever had to, beyond reasonable doubt.

10 If we can go to the next slide, please.

11 We begin with the Court's order, the Court's July 9 order.  
12 And that order states very clearly what conduct was required.  
13 And the conduct that was required was that no entity could  
14 commence or pursue -- those are really the magic words --  
15 commence or pursue a claim against Mr. Seery without the  
16 Bankruptcy Court doing certain things. And we've referred to  
17 this as the gatekeeper. And the only question I believe the  
18 Court has to ask today is whether the Respondents commenced or  
19 pursued a claim against Mr. Seery without seeking Bankruptcy  
20 Court approval, as set forth in this order.

21 I'll dispute that there's anything ambiguous about this.  
22 I'll dispute that it could not be clearer what conduct was  
23 prohibited. It could not be clearer. The only question is  
24 whether the conduct constitutes the pursuit of a claim.

25 Let's see what they did. If we could go to the next

1 slide. There will be no dispute about what they did. And  
2 what they did is, a week after filing a lawsuit against the  
3 Debtor and two others arising out of the HarbourVest  
4 settlement, a settlement that this Court approved, after  
5 notice and a hearing and participation by the Respondents,  
6 after they had the opportunity to take discovery, after they  
7 had the opportunity to examine Mr. Seery about the value of  
8 HarbourVest's interest in HCLOF, after all of that, they  
9 brought a lawsuit after Mr. Patrick took control of the DAF  
10 and CLO Holdco. And that lawsuit related to nothing but the  
11 HarbourVest suit, and it named in Paragraph 2, right up above,  
12 Mr. Seery as a potential party. And a week later, Your Honor,  
13 they filed what we call the Seery Motion, and it was a motion  
14 for leave to amend their complaint to add Mr. Seery as a  
15 defendant.

16 We believe that that clearly violates the Court's July 7  
17 order. And indeed, again, these are facts. They're not --  
18 they're not in dispute. Just look at the first sentence of  
19 their motion. The purpose of the motion was to name James  
20 Seery as a defendant. That was the purpose of the motion.  
21 And the way that they made the motion, Your Honor -- and these  
22 are undisputed facts -- the way they made the motion, Your  
23 Honor, shows contemptuous intent. We don't have to prove  
24 intent, but I think it might be relevant when you get to  
25 remedies. Okay?

1       And so how do I -- why do I say that? Because they made  
2 this motion, Your Honor, and they didn't have to. Everybody  
3 knows that under Rule 15 they could have amended the complaint  
4 if they wanted to. If they wanted to, they didn't need the  
5 Court's permission. What they wanted to do was try to get the  
6 District Court to do what they knew they couldn't. And that's  
7 contemptuous.

8       And they did it, Your Honor, without notice to the Debtor.  
9 Even after the Debtor had accepted service of the complaint,  
10 even after we told them, if you go down this path, we're going  
11 to file a motion for contempt, they did it anyway. They  
12 didn't serve the Debtor. They didn't give the Debtor a  
13 courtesy copy. They didn't notify the Debtor. The only thing  
14 that happened was the next day, when the District Court  
15 dismissed it without prejudice, they sent us a copy of that  
16 notice. And within three days, we were here.

17       A court order was in effect. Mr. Patrick is going to  
18 admit to that. There's not going to be any dispute about  
19 that. The order required that the Respondents come to this  
20 Court before they pursue a claim against Mr. Seery, and they  
21 failed to comply with that order. The facts, again -- if we  
22 can go to the next slide. We can look at some of the detail,  
23 because the timeline is mindboggling.

24       Mr. Patrick became the Plaintiffs' authorized  
25 representative on March 24th. And folks, when I took their

1 depositions, weren't specific about dates, and that's why some  
2 of the entries here refer to sometime after, but there's no  
3 question that the order of events is as presented here and as  
4 the evidence will show today.

5 The evidence will show that sometime after Patrick became  
6 the Plaintiffs' authorized representative, Mr. Dondero  
7 informed Mr. Patrick that Highland had usurped an investment  
8 opportunity from the Plaintiffs. Mr. Patrick is going to  
9 testify to that. Mr. Patrick is also going to testify that,  
10 without prompting, without making a request, D.C. Sauter, the  
11 general counsel of NexPoint Advisors, recommended the Sbaiti  
12 firm to Mr. Patrick. Mr. Patrick considered nobody else.

13 Mr. Patrick retained the Sbaiti firm in April. In other  
14 words, within 12 days of the filing of the complaint. They're  
15 retained and they conduct an investigation. You're going to  
16 hear the assertion of the attorney-client and the common  
17 interest privilege every time I ask Mr. Dondero what he and  
18 Mr. Sbaiti talked about and whether they talked about naming  
19 Jim Seery as a defendant. But with Patrick's authorization,  
20 the Sbaiti firm filed the complaint on April 12th, just days  
21 after they were retained.

22 It's like a -- it's an enormous complaint. I don't know  
23 how they did that so quickly. But in any event, the important  
24 point is that they all worked together. None of this happened  
25 until Mr. Patrick became the authorized representative.

1       Mr. Patrick is going to tell you, Your Honor, he's going  
2 to tell you that he had no knowledge of any wrongdoing by Mr.  
3 Seery prior to the time he assumed the rein of the DAF and the  
4 CLO Holdco. He had no knowledge, Your Honor, of any claims  
5 that the DAF and CLO Holdco had against the Debtor until he  
6 became the Plaintiffs' authorized representative and Mr.  
7 Dondero spoke to him.

8       If we can flip to the next page. Mr. Dondero has  
9 effective control of the DAF. He has effective control of CLO  
10 Holdco. You're going to be bombarded with corporate documents  
11 today, because they're going to show you -- and they want you  
12 to respect the corporate form, they really want you to follow  
13 the rules and respect the corporate form, because only Mr.  
14 Scott was responsible for the DAF and CLO Holdco until he  
15 handed the reins on March 24th to Mr. Patrick. Mr. Dondero  
16 has nothing to do with this. He's going to tell you. He's  
17 going to tell you he had nothing to do with the selection of  
18 Mr. Patrick as Mr. Scott's replacement.

19       The facts are going to show otherwise, Your Honor. The  
20 DAF is a \$200 million charitable organization that is funded  
21 almost exclusively with assets derived from Highland or Mr.  
22 Dondero or the Get Good Trust or the Dugaboy Trust. The  
23 evidence is going to show that at all times these entities had  
24 shared services agreements and investment advisory agreements  
25 with HCMLP. The evidence will show that HCMLP at all times

1 was controlled by Mr. Dondero.

2       And it made sense. The guy put in an awful lot of money  
3 for charitable usage. Is he really just going to say, I don't  
4 really care who runs it? The evidence is going to show that  
5 between October 2020 and January 2021, Grant Scott actually  
6 exercised independence. Grant Scott was Mr. Dondero's  
7 childhood friend. They went to UVA together. They were  
8 roommates. Mr. Scott was the best man at Mr. Dondero's  
9 wedding. But we were now in bankruptcy court. We're now in  
10 the fishbowl. And I will -- this may be a little argument,  
11 but there's no disputing the facts that Mr. Scott acted  
12 independently, and he paid the price for it. Mr. Scott did it  
13 three times.

14       He did it when he amended CLO Holdco's proof of claim to  
15 take it down to zero. He did it again after he withdrew the  
16 objection to the HarbourVest settlement motion. And he did it  
17 again when he settled the lawsuit that the Debtors had brought  
18 against CLO Holdco. And that -- and on each of those three  
19 occasions, the evidence will show that Mr. Scott did not  
20 communicate with Mr. Dondero in advance, that Mr. Dondero  
21 found out about these acts of independence after the fact, and  
22 that each time he found out about it he had a little  
23 conversation with Mr. Scott.

24       Mr. Dondero is going to tell you about it, and he's going  
25 to tell you that he told Mr. Scott each act was inappropriate.

1 You may have heard that word before. Each act was not in the  
2 best interests of the DAF.

3 The last of those conversations happened either on or just  
4 after January 26th. And by January 31st, Mr. Scott gave  
5 notice of his resignation. And you're going to see that  
6 notice of resignation. And he asks for releases.

7 Mr. Patrick becomes, almost two months later, the  
8 successor to Mr. Scott. Mr. Dondero is going to say he has no  
9 idea how that happened. He was just told after the fact that  
10 Mr. Patrick and Mr. Scott had an agreement. He's going to  
11 tell you they had an agreement and he just heard about it  
12 afterwards. He didn't really -- for two months, I guess, he  
13 sat there after Mr. Scott told him that he wanted out and did  
14 nothing to try to find out who's going to take control of my  
15 charitable foundation with \$200 million. He wasn't  
16 interested.

17 But here's the thing, Your Honor. If we go to the next  
18 slide. Let's see what Mr. Scott said at his deposition last  
19 week. Question, "Do you know who selected Mark?" Answer, "I  
20 do not." Question, "Do you know how Mark was selected?" Mark  
21 is a reference to Mark Patrick. "I do not." "Did you ever  
22 ask Mark how he was selected?" "I did not." "Did you ever  
23 ask Mark who selected him?" "I did not." "Did you ever ask  
24 anybody at any time how Mr. Patrick was selected to succeed  
25 you?" "No, I did not." "Did you ever ask anybody at any time

1 as to who made the decision to select Mr. Patrick to succeed  
2 you?" "No, I did not."

3 So I don't know what happened between Mr. Patrick and Mr.  
4 Dondero when Mr. Patrick supposedly told Mr. Dondero that  
5 there was an agreement with Mr. Scott, but that is news to Mr.  
6 Scott. He had no idea.

7 Your Honor, we are going to prove by clear and convincing  
8 evidence that each of the Respondents violated a very clear  
9 and specific court order. And unless the Court has any other  
10 questions, I'll stop for now.

11 THE COURT: No questions.

12 MR. MORRIS: Thank you, Your Honor.

13 THE COURT: All right. Who is making the argument  
14 for the Respondents?

15 MR. SBAITI: Your Honor, I am. I'm just trying to  
16 put the PowerPoint up on the WebEx.

17 THE COURT: Okay.

18 MR. SBAITI: Sorry about that.

19 MR. MORRIS: Your Honor, I'll try not to make this a  
20 practice, but can I inquire as to how much time I used?

21 THE COURT: Oh. Nate?

22 THE CLERK: About thirteen minutes.

23 THE COURT: Thirteen minutes?

24 MR. MORRIS: Thank you very much.

25 THE COURT: Okay. All right.

1                   MR. SBAITI: Your Honor, our PowerPoint is a little  
2 bit longer than that one. May I approach with a copy?

3                   THE COURT: You may. Uh-huh.

4                   (Pause.)

5                   MR. SBAITI: Your Honor, it does feel good to be back  
6 in the courtroom.

7                   THE COURT: Okay.

8                   MR. SBAITI: It's been a long time.

9                   THE COURT: Yes. For us, too.

10                  MR. SBAITI: Just wish it wasn't under a circumstance  
11 where someone is trying to sanction me.

12                  But we're going to be dividing up this oral argument a  
13 little bit. Also, to just kind of break up a little bit of  
14 the monotony, because I think we have a lot to cover at the  
15 opening stage of this. And I'll try to be as expeditious as I  
16 can be.

17                  OPENING STATEMENT ON BEHALF OF THE SHOW CAUSE RESPONDENTS

18                  MR. SBAITI: Your Honor, the thing we -- the thing we  
19 open with is the due process issue that we raised in our  
20 brief. And where this really arises from is the Court's show  
21 cause order calls us violators before we've had a chance to  
22 respond to the allegations and before we've obviously been  
23 able to approach this hearing. And the word violators means  
24 something to us, Your Honor, because I've been a lawyer for a  
25 long time, my partner has been a lawyer for a long time, our

1 clients have never been sanctioned, we've never been  
2 sanctioned, and for us to be labeled violators first by  
3 counsel and then in a court order makes us wonder whether or  
4 not this process is already prejudged or predetermined.

5 THE COURT: I actually want to address that. Turn  
6 off the clock.

7 Just so you know, I looked this up a while back, because  
8 we gave a bankruptcy judges panel at some CLE. The average  
9 bankruptcy judge in our district, back when I looked, signs  
10 over 200 orders a week.

11 MR. SBAITI: Sure.

12 THE COURT: Many of those -- in fact, most of them --  
13 are submitted by lawyers. So, you know, a big chunk of my  
14 week is signing orders. And I obviously give more scrutiny to  
15 those that are substantive in nature. Okay? If someone  
16 submits to me a 50-page debtor-in-possession financing order,  
17 I will look at that much more carefully than what I consider a  
18 mere procedural order setting a hearing.

19 So I regret that that word was used, but I can assure you  
20 I fairly quickly set that -- signed that, I should say --  
21 regarding it as a merely procedural order setting a hearing.  
22 Okay? So it's as simple as that. There was no hmm, I like  
23 that word, violator. I had a stack, if you will, an  
24 electronic stack of probably 200 orders in front of me the day  
25 I signed that. Okay?

1           So, if that makes anyone feel any better, I don't know,  
2 but that's the reality.

3           Okay. You can start the clock again.

4           MR. SBAITI: And I appreciate Your Honor saying that.  
5 It does make us feel better, both about where the -- the  
6 genesis of the order and the impact and its reflection on what  
7 Your Honor thinks in terms of going into this.

8           The other thing that obviously raised concerns, and I  
9 assume this comes from the same place, was four days ahead of  
10 that order counsel told us the Court was going to order  
11 everyone to be in person, and they had advance notice of that,  
12 and we weren't sure how they had advance notice of that. I  
13 guess they assumed --

14           THE COURT: I can assure you right here on the record  
15 I never had ex parte communications with any lawyer in this  
16 case, on this matter or any other matter. Okay? Again, those  
17 are pretty strong words to venture out there with, which your  
18 pleading did venture out there with those words.

19           My courtroom deputy, Traci, I think answers her phone 24  
20 hours a day. So I'm quite sure she had communications with  
21 the lawyers about this, just like she probably had  
22 communications with you and your firm and every other firm in  
23 this case. Okay?

24           MR. SBAITI: Like I said, Your Honor, we appreciated  
25 what Your Honor -- appreciate what Your Honor said, but that

1 issue obviously stuck out -- stuck out to us, in combination.

2 So I'll move on from that issue.

3 This has to do with the lawsuit that was filed, and the  
4 lawsuit, the genesis of the lawsuit, I think it's important to  
5 say, because the argument has been raised in the briefing and  
6 we wanted to address it upfront, why the lawsuit comes about.  
7 And it comes about because of the Advisers Act and the  
8 responsibilities that the Debtor has to the assets of the  
9 funds that it manages. And the Advisers Act imposes a duty  
10 not only on Highland but obviously on its control people and  
11 its supervised people. And the lawsuit has to do with HCLOF,  
12 which is what HarbourVest owned a piece of. And Highland, as  
13 the advisor to HCLOF and the advisor to the DAF, owed  
14 fiduciary duties to CLO Holdco, which is the DAF's holding  
15 entity of its assets in HCLOF, but Highland Capital was also  
16 an advisor, a registered investment advisor to the DAF  
17 directly at the time. And so those federally-imposed  
18 fiduciary duties lie at the crux of that lawsuit.

19 Moving on, Mr. Seery testified at the hearing that was in  
20 this Court to be -- to get him appointed, and this was Exhibit  
21 2 that was presented by the Debtor, and on Page 16 at the  
22 bottom he says -- of the transcript, he says, I think, from a  
23 high level, the best way to think about the Debtor is that  
24 it's a registered investment advisor. As a registered  
25 investment advisor, which is really any advisor of third-party

1 money over \$25 million, it has to register with the SEC, and  
2 it manages funds in many different ways.

3 In the middle of the next page he says, In addition, the  
4 Debtor manages about \$2 billion, \$2 billion in total managed  
5 assets, around \$2 billion in CLO assets, and then other  
6 securities, which are hedge funds -- other entities, rather,  
7 which are hedge funds or PE style. Private equity style.

8 On Page 23 towards the bottom he says, As I said, the  
9 Investment Advisers Act puts a fiduciary duty on Highland  
10 Capital to discharge its duty to the investors. So while we  
11 have duties to the estate, we also have duties, as I mentioned  
12 in my last testimony, to each of the investors in the funds.  
13 CLO Holdco would be an investor in one of those funds, HCLOF.

14 He goes on to say, Some of them are related parties, and  
15 those are a little bit easier. Some of them are owned by  
16 Highland. HCLOF was not owned by Highland. But there are  
17 third-party investors in these funds who have no relation  
18 whatsoever to Highland, and we owe them a fiduciary duty both  
19 to manage their assets prudently but also to seek to maximize  
20 value.

21 Now, the lawsuit alleges that Seery testified that the  
22 HarbourVest portion of Highland CLO Funding was worth \$22-1/2  
23 million. Now, Mr. Morris wants the Court to hinge on the fact  
24 that, well, no one asked him whether he was lying. But that's  
25 not really the standard, and it certainly isn't the standard

1       when someone's an investment advisor and owes fiduciary  
2       duties, which include fiduciary duties to be transparent with  
3       your investors.

4           It also includes fiduciary duties not to self-deal.

5           The lawsuit also alleges that, in reality, those assets  
6       were worth double that -- double that amount at the time. We  
7       found out just, you know, in late March/early April that a  
8       third -- from a third party who had access to the underlying  
9       valuations at the time that those values were actually double  
10      and that there was a misrepresentation, giving rise to the  
11      lawsuit. That change in circumstance is the key issue behind  
12      the lawsuit.

13           We allege that Mr. Seery and the Debtor, as RIAs, had a  
14      duty to not self-deal and be fully transparent with that  
15      information, and we think both of those things were violated  
16      under the Advisers Act.

17           We don't allege that the HarbourVest settlement should be  
18      undone or unwound. We can't unscramble that egg. We do seek  
19      damages, as I believe is our right, arising out of the  
20      wrongdoing and the process of pushing forth the settlement.

21           I think one of the allegations in the actual motion for  
22      the show cause order was that this was going to undo all of  
23      the hard work that Court had done and basically unwind and try  
24      to re-piece Humpty Dumpty back together again. But that's  
25      simply not the case. Nowhere in our allegations or in the

1 relief that we request are we trying to undo the HarbourVest  
2 settlement as such.

3 Now, whether the lawsuit should be dismissed under the  
4 affirmative defenses that they bring up -- res judicata,  
5 waiver, release -- all of those are questionable under the  
6 Advisers Act, given the change of circumstance, and therefore  
7 are also questions on the merits. They don't go to the  
8 colorability of the underlying claims in and of themselves,  
9 which I think is important.

10 So we asked for leave to amend from the Court. And what  
11 they want us to do, Your Honor, is they want to sanction us  
12 for asking. They're saying asking for leave to amend is the  
13 same thing as pursuing a claim. And I'll get to the specifics  
14 on that in a little bit. But that's the frame. Can we be  
15 sanctioned for asking a court, any court, even if it's the  
16 wrong court, for permission to bring the lawsuit? They don't  
17 cite a single case that says that that, in and of itself, is  
18 sanctionable conduct, us asking.

19 So I'd like to introduce some of the Respondents.

20 Your Honor, may I have one of these waters?

21 THE COURT: Certainly.

22 MR. SBAITI: Thank you.

23 THE COURT: That's why they're there, by the way.

24 MR. SBAITI: I didn't know if they belonged to  
25 somebody else.

1                   THE COURT: We've scattered water bottles around for  
2 people.

3                   MR. SBAITI: I appreciate it. Thank you, Your Honor.

4                   THE COURT: So if you see these little ones, that's  
5 for anyone.

6                   MR. SBAITI: So, this is an org chart, and you'll see  
7 it as -- the exhibits that the Debtor's going to bring up.  
8 And when we talk about the DAF, Your Honor -- I don't know if  
9 that's visible to you. We're on Slide 19, if you're looking  
10 at it on paper. There's a little number at the lower right-  
11 hand corner. The charitable DAF GP, LLP and then the  
12 Charitable DAF Holdco, Ltd. together are the principles of the  
13 Charitable DAF Fund, LP. And so when we refer to the DAF or  
14 the Charitable DAF, that's really the entity structure that  
15 we're referring to. And then the GP and Holdco Ltd. have a  
16 managing member. It used to be Grant Scott at the time this  
17 was done. Today, it's Mr. Mark Patrick, who's in the room,  
18 sitting next to Mr. Bridges.

19                  The DAF is a charitable fund. It's funded over \$32  
20 million, as the evidence will show, including Dallas-Fort  
21 Worth organizations, The Family Place, Dallas Children's  
22 Advocacy, Center for Brain Health, the Crystal Ray Initiative,  
23 Friends of the Dallas Police, Snowball Express, various  
24 community and education initiatives, Dallas Arts, museums, the  
25 Perot Museum, Dallas Zoo. That evidence is undisputed, Your

1 Honor. The DAF is a real fund. It is a real charitable fund.  
2 It does real good in the community.

3 Now, Respondents -- Holdco, which you will see at the  
4 bottom of that chart, is essentially the investment arm.  
5 There are assets that the DAF owns in various pots, and Holdco  
6 is the actual business engine that generates the money from  
7 those assets that then -- that then gets passed up to the  
8 charitable -- the four charitable foundations at the top.

9 I'll go back to Slide 21. And if you look at the top,  
10 Your Honor, the Dallas Foundation, Greater Kansas City  
11 Community, Santa Barbara Foundation, The Community Foundation  
12 of North Texas: Those are the charities that then themselves  
13 bestow the funds onto the actual recipients. So the money  
14 flows up as dividends or distributions, and then gets  
15 contributed.

16 CLO Holdco invests those assets, and it's an important  
17 part of the business model, so that you're not sending out  
18 principal. It's the money that CLO makes, the profits, if you  
19 will, that it is able to generate that gets donated and makes  
20 its way into the community.

21 So there's an important feature to the structure in that  
22 it has to be able to generate money. It's not just money that  
23 sits there and waits to be distributed. There's active  
24 investing going on.

25 Mr. Mark Patrick owns the control shares of the entities

1 comprising the DAF and CLO Holdco, as I showed you, and the  
2 beneficiary charitable foundations hold what we call  
3 beneficial interests, where they just get money. They don't  
4 have a vote.

5 Mr. Patrick cares about the public service the DAF engages  
6 in. He's been an advisor to the DAF, CLO Holdco, and its  
7 predecessor, Mr. Scott, since its inception. He receives no  
8 compensation for the job he's doing today. And you'll hear  
9 how he became -- how he inured to the control position of the  
10 DAF and CLO Holdco from him, but it doesn't involve Mr.  
11 Dondero, and the absence of someone saying that it did, I  
12 think, is going to be striking by the end of the presentation  
13 of evidence.

14 Their only argument against you, Your Honor, is going to  
15 be you just can't believe them. But not believing witnesses  
16 is not a substitute for the lack of affirmative evidence.

17 Mr. Patrick has said all along he authorized the filing of  
18 the motion for leave to add Mr. Seery to the lawsuit in  
19 District Court. He doesn't believe the motion to amend  
20 violated this Court's orders, for the reasons stated in our  
21 responsive filings to the motions for contempt and show cause  
22 order. That's why he authorized it.

23 My firm, Sbaiti & Company, we're a small Dallas litigation  
24 boutique retained by the DAF and CLO Holdco to file the  
25 lawsuit. We did an investigation. I'm tickled to death that

1 Mr. Morris loved our complaint so much and gave us the  
2 compliment that we got it done in a short amount of time, but  
3 we did get it done in a short amount of time, because, in the  
4 end, it's a rather simple issue, as I was able to lay it out  
5 in about three or four bullet points in a previous slide.

6 The written aspect of that doesn't take that long, as Your  
7 Honor knows, but the idea that there's a suspicion that we  
8 didn't write it or someone else wrote it and ghost-wrote it  
9 and gave it to us, which I think is the insinuation he was  
10 making, is completely unfounded. There's no evidence of that.

11 We carefully read Your Honor's orders. We developed a  
12 good-faith basis, as required by Rule 11, that the lawsuit and  
13 the motion to add Mr. Seery were not filed in bad faith or for  
14 an improper purpose. We don't think they're frivolous. We  
15 don't think they're in violation of Your Honor's orders, given  
16 the current state of the law.

17 Mr. Dondero is one of the settlors of the CRT, of the  
18 Charitable Remainder Trust that ultimately provided assets to  
19 CLO Holdco and the DAF. He does care about the DAF's mission.  
20 I think Mr. Morris hit the nail on the head. Of course Mr.  
21 Dondero cares about what happens to it. He's one of the  
22 settlors, and it was his funds that initially were put into  
23 it, so he's allowed to care. And I don't think him caring is  
24 insidious, and him caring doesn't mean he has control and  
25 doesn't mean he's the driving force behind some insidious

1 conspiracy that they're trying to insinuate exists.

2 He is an advisor to the DAF and CLO Holdco. It is a lot  
3 of money and it needs advice, and he's an advisor to Mr.  
4 Patrick. We don't run away from any of those facts, Your  
5 Honor.

6 We also don't run away from the fact that he was the  
7 source of some of the information that came in to that  
8 complaint and that he relayed some of that information. The  
9 content, we do claim work product privilege and attorney-  
10 client privilege, because he's an agent of our client, and as  
11 lawyers doing an investigation, the content of our  
12 communications is protected under the attorney-client and work  
13 product privileges, as well as the joint interest privilege.  
14 But the fact that we admit that those communications happened,  
15 we're not running away from that fact.

16 So, what does he have to do with this? It's interesting  
17 that that opening argument you just heard spent about three  
18 minutes on contempt and the other fourteen or fifteen minutes  
19 or so on Mr. Dondero. And only on Mr. Dondero. There's a  
20 negative halo effect, I believe, that they're trying to get  
21 this Court to abide by. They want to inflame Your Honor and  
22 hopefully capture -- cultivate and then capitalize on whatever  
23 antipathy you might have for Mr. Dondero, and then sweep us  
24 all in under that umbrella and sanction everybody just because  
25 he had some involvement.

1           But whatever involvement he has, which we admit he had  
2 some involvement in helping us marshal the facts, that's not a  
3 basis for us to be sanctioned if there isn't an actual  
4 sanctionable conduct that -- as we say there isn't.

5           We think there's an ulterior motive. That's why Mr.  
6 Morris just announced to Your Honor, Mr. Dondero controls it  
7 all. The ulterior motive, I believe, is, down the line, when  
8 they want to argue some kind of alter ego theory, they want to  
9 lay that foundation here. I don't think this is the  
10 appropriate time for that foundation, and I don't think any of  
11 the information and the evidence they're trying to marshal in  
12 front of you is really going to be relevant to the very  
13 specific question that's before Your Honor: Does our motion  
14 asking the District Court to add Mr. Seery violate your order,  
15 or violate it in a way that can be -- that we can be  
16 sanctioned for? We don't believe it violates it.

17           So, the three core standards that have to be met. First  
18 of all, civil contempt requires a valid, enforceable order.  
19 It's not debatable and it's not -- I don't think that's a  
20 shocking statement. Then they have to have clear and  
21 convincing evidence of a violation of a specific unambiguous  
22 term therein. Mr. Morris wants his version of the word pursue  
23 to be unambiguous, and I think the word pursue is unambiguous.  
24 But the way he wants you to construe it makes it completely  
25 ambiguous, and we'll -- I'll get to that in a moment.

1       Now, for sanctioning counsel, the Fifth Circuit has held  
2 you have to find bad faith. We're adjudged under a slightly  
3 separate standard under the Fifth Circuit law. So the  
4 contempt motion, though, to the extent it seeks to impose  
5 double and treble attorney's fees, those are in punitive  
6 fines. They are not compensatory. So criminal contempt  
7 standards are raised, and so they have to show a violation in  
8 bad faith. In other words, our arguments that we're making  
9 have to be bad faith, not simply that we're wrong, and they  
10 have to show beyond a reasonable doubt, usually in front of a  
11 jury. The U.S. Supreme Court explained the difference and the  
12 different procedural protections that have to be involved if  
13 they're really going to seek double and treble compensatory  
14 damages.

15       Now, he's right. Saying we intended -- saying that we  
16 didn't mean to violate it isn't necessarily a defense. But  
17 what you're actually going to hear from him is the opposite  
18 argument, that even though we didn't violate it, we wanted to.  
19 That's what he says. That's why he quoted you the opening  
20 section of our motion asking for permission to sue Mr. Seery,  
21 because that's a statement of purpose. And he says you should  
22 sanction them right there. That's literally what he said.  
23 It's right there, their purpose. If intent is irrelevant to  
24 them, it's irrelevant as to us. The fact that we wanted to  
25 sue Seery is fully admitted. We don't deny the fact that we

1 believe Mr. Seery should be a defendant in this lawsuit. But  
2 the fact that we didn't sue him is why we didn't violate the  
3 order. And they can't say that the fact that we eventually  
4 wanted to sue him means we did violate the order. That door  
5 swings both ways, Your Honor.

6 We don't think any element is met. The order, while writ  
7 large, prohibits suing Mr. Seery without permission, and we  
8 did not sue James Seery, pure and simple. The July 12 --  
9 14th, 2020 order purports to reserve exclusively to this Court  
10 that which, according to the statutes and the case law, we  
11 believe the Court can't exclusively reserve to itself. And  
12 Your Honor, the order prohibits commencing and pursuing a  
13 claim against Jim Seery without coming here first to decide  
14 the colorability of such a claim.

15 They, I believe, admit that we didn't commence a claim  
16 against Jim Seery. I think they've admitted that now. So now  
17 we're talking about what does pursue mean? We didn't pursue a  
18 claim against Jim Seery. Is asking for leave to bring suit  
19 the same thing as pursuing a claim? That's the question  
20 that's really before Your Honor. Lawyers never talk of  
21 pursuing a claim that hasn't been filed. We don't say, I'm  
22 pursuing a claim and I'm going to file it next week or next  
23 year. Usually, that type of language is in an order, because  
24 when the order happens, there may already be claims against  
25 Mr. Seery. And so the pursuit of claim is supposed to attack

1 those cases, to come here and show colorability, presumably,  
2 before they continue on with those lawsuits. It doesn't mean  
3 asking for permission.

4 If it did mean asking for permission, then complying with  
5 Your Honor's order would be a violation. If the motion for  
6 leave is a violation because it is pursuing a claim, if I had  
7 filed that motion in this Court, it would still be pursuing a  
8 claim without Your Honor's permission. I'd have to get  
9 permission just to ask for permission. It puts us in this  
10 endless loop of, well, if asking for permission is pursuing a  
11 claim, and pursuing a claim is without permission violates the  
12 Court's order, we'd always be in violation of the Court's  
13 order just for asking, just for following Your Honor's edict.

14 THE COURT: I'm just, I'm going to interject. You  
15 were supposed to, under the order, file a motion in this  
16 Court.

17 MR. SBAITI: I understand that, Your Honor, and I  
18 think that we can get to the specifics on why we disagree with  
19 how the motion went, Your Honor. We hadn't sued Mr. Seery.  
20 So as long as we dealt with the order, which is what our  
21 position is, then we don't believe we violated the order.

22 THE COURT: You think the order was ambiguous,  
23 requiring a motion to be filed in the Bankruptcy Court?

24 MR. SBAITI: Your Honor, what we believe is that the  
25 order was ambiguous in terms of whether us asking for

1 permission in the District Court was in and of itself a  
2 violation of the order. We don't think it was. Actually, we  
3 don't think the order's ambiguous to that extent. The second  
4 we file a suit against Mr. Seery and we don't have some  
5 resolution of the issue, then I think the question of  
6 sanctionability comes in. But we never filed suit, Your  
7 Honor.

8 The Court doesn't say I can't seek permission in the  
9 District Court or that we can't go to the District Court with  
10 -- which has general jurisdiction over this case, and has  
11 jurisdiction, we believe, over the actual case and controversy  
12 that's being raised. But the idea of pursuit being a  
13 violation of the order, of the letter of that order, is  
14 nonsensical under that, it leads to an absurd result, and it's  
15 plainly vague and ambiguous, Your Honor.

16 Asking Judge Boyle or asking a District Court for  
17 permission is not a violation of this Court's order, not the  
18 way it was written and not -- and I don't even believe it was  
19 a violation necessarily of the Court's -- of the language that  
20 the Court has. We -- it doesn't unambiguously prevent us from  
21 asking the District Court for leave.

22 The Court's order yesterday, Your Honor, applied this very  
23 rule. The TRO -- you said the TRO did not specifically state,  
24 Turn your cell phone over. And you denied motion for  
25 sanctions on that. That's basically the argument we're making

1 here, Your Honor. We think that was the correct ruling, and  
2 we think the same type of ruling applies here.

3 Your order yesterday also determined that the Court  
4 ultimately believes that hiring lawyers to file motions should  
5 not be viewed as having crossed the line into contemptuous  
6 behavior. That's essentially the argument they want you to  
7 buy, that there's somehow a vindictiveness behind this and an  
8 insidious plan to violate court orders, Your Honor. We don't  
9 have any evidence of that.

10 THE COURT: Okay. Take the words vindictiveness and  
11 insidious out of the equation. That's making things personal,  
12 and I don't like that. The key is the literal wording of the  
13 order, is it not?

14 MR. SBAITI: Your Honor, the key, I believe, is the  
15 --

16 THE COURT: No entity may commence or pursue a cause  
17 of action of any kind against Mr. Seery relating in any way to  
18 his role as the chief executive officer and chief  
19 restructuring officer of the Debtor without the Bankruptcy  
20 Court first determining, after notice, that such claim or  
21 cause of action represents a colorable claim of willful  
22 misconduct or gross negligence against Mr. Seery and  
23 specifically authorizing such entity to bring such a claim.  
24 So I'm trying to understand why you argue that filing a motion  
25 asking the District Court for permission is not inconsistent

1 with this order.

2 MR. SBAITI: Because it's not commencing a claim,  
3 Your Honor. It's not commencing a claim against him.

4 THE COURT: Okay. So is your argument that if Judge  
5 Boyle authorizes amendment of the pleading to add Mr. Seery  
6 and then you do it, at that point they may have grounds for a  
7 motion for contempt, but not yet, because she has not actually  
8 granted your motion?

9 MR. SBAITI: Correct, Your Honor. I mean, in a  
10 nutshell. In fact, that's one of -- I think that's probably  
11 our next argument. We think, in a sense, this argument is  
12 incredibly premature. There is three ways that this -- well,  
13 I'd like to address this, so I've got -- I've got a diagram  
14 that I think will actually help elucidate what our thought  
15 process was.

16 There's three things she could have done. She could have  
17 referred -- referred it to Your Honor, which is what we  
18 expected was likely to happen.

19 THE COURT: But you didn't file a motion for referral  
20 of the motion before her.

21 MR. SBAITI: Well, no, I don't mean in respect of  
22 enforcing the reference. The referral we thought was most  
23 likely going to happen because it's an associated case, and we  
24 actually put those orders in front of her, so we expected that  
25 those orders would end up -- that the question would

1 ultimately end up in front of Your Honor on that basis.

2 She could have denied our motion outright, in which case  
3 we haven't filed a claim, we haven't violated it, or she could  
4 have granted our motion and done one of two things. She could  
5 have granted it to the extent that she thought leave would be  
6 proper but then referred it down, or she could have decided --  
7 taken the decision as the court with general jurisdiction and  
8 simply decided it all on her own. She had all of those  
9 options, Your Honor, and none of them results in a claim being  
10 commenced or pursued without the leave of this Court, if leave  
11 is absolutely necessary, Your Honor. And that's the point  
12 that we were trying to make.

13 Your Honor, the -- there's -- you know, there's no  
14 evidence that, absent an order from a court with jurisdiction,  
15 that we were going to file a claim against Mr. Seery, that we  
16 were going to commence or pursue a claim against Mr. Seery.  
17 We were cognizant of Your Honor's order. We considered that.  
18 And the reason we filed them the way we did is because,  
19 according to the statutes and the case law, this is the type  
20 of case that would be subject to a mandatory withdrawal of the  
21 reference.

22 And so there's this paradox that arises, Your Honor. And  
23 the paradox that arises is that we show up and immediately go,  
24 well, we need to be back in the District Court. So we filed  
25 our motion there, and I don't think that was contemptuous, it

1       wasn't intended to be contemptuous of the Court, but we showed  
2       the orders to the Court, made the same arguments that we have  
3       been making here, that we believe that there's problems with  
4       the order, we believe the order oversteps its jurisdiction and  
5       maybe is unenforceable, and it's up to that District Court, as  
6       it has been in almost all of these other gatekeeper order  
7       cases that get filed. None of them result in sanctions, Your  
8       Honor. What they result in is a District Court deciding,  
9       well, either they refer it or they decide I don't need to  
10      refer it. But I don't think that that is the same thing as  
11      commencing or pursuing a claim in the end, Your Honor, because  
12      all we did was ask for permission, and permission could have  
13      been denied or granted or granted in part.

14           Your Honor, they haven't cited an injury. You've heard  
15      the testimony, Your Honor, that they -- the first time they  
16      knew we had filed a motion -- which I don't understand why  
17      that's the first time they knew we had filed a motion; we told  
18      them we were going to file the motion -- was when I forwarded  
19      an email saying that it's been denied without prejudice, Your  
20      Honor. Well, that means they didn't have to do any work to  
21      respond to the motion. They didn't have to do any work to do  
22      any of the other things.

23           And one hundred percent of the damages that they're going  
24      to say they incurred is the litigation of this contempt  
25      hearing or this sanction motion, as opposed to some other

1 simpler remedy, like going in to Judge Boyle and saying, Your  
2 Honor, all that needs to go, which is what they eventually  
3 did. But they would have had to incur those costs anyway  
4 because they're now moving to enforce the reference. They  
5 filed a 12(b) (6). That briefing would have existed regardless  
6 of whether or not we had filed our motion, regardless of  
7 whether the sanctions hearing had commenced.

8 Your Honor, I'm going to let my partner, Mr. Bridges,  
9 address this part of it, if I could. I think that gets into  
10 more of the questions that you asked, and I think he can  
11 answer them a lot better than I can.

12 THE COURT: Okay.

13 MR. SBAITI: Thank you.

14 THE COURT: That's fine.

15 MR. BRIDGES: Thank you, Your Honor. And I do want  
16 to address pointedly the questions that you're asking. First,  
17 though, I was hoping to back up to some preliminary remarks  
18 that you made and say that I find the 200 orders a week just  
19 mindboggling. It amazes me, and puts the entire hearing in a  
20 different perspective for me. I'm grateful that you shared  
21 that with us.

22 Your expression of regret about naming us violators was  
23 very meaningful to me. It causes me -- well, the strong words  
24 in our brief were mine. I wrote them. And your expression of  
25 regret causes me to regret some of those words. I'm hopeful

1 that you can understand, at least in part, our reaction out of  
2 concern.

3       And Your Honor, it's awkward for me to talk about problems  
4 with your order, and that's the task that's come to me, to  
5 list and talk through four of them and why we think they put  
6 us in a really awkward position in deciding what to do in this  
7 case, in the filing of it, in where we filed it, and in how we  
8 sought leave to go forward against Mr. Seery. That was  
9 awkward and difficult for us, and I'm hopeful that I can  
10 explain that and that you'll understand, if I'm blunt about  
11 problems with the order, that I mean it very respectfully.  
12 Two hundred orders a week is still very difficult for me to  
13 get my mind around.

14       The four issues in the order start with the gatekeeping.  
15 Then, secondly, in the preliminary remarks, I made mention of  
16 the *Applewood* case and the notice that the order releases some  
17 claims. Its effect of --

18       THE COURT: And by the way, I mean, you might  
19 elaborate on the facts and holding of *Applewood*, because I  
20 came into this thinking *Republic Supply v. Shoaf*, and for that  
21 matter, as I said, *Espinosa*, were much more germane. And so,  
22 you know, you'll have to elaborate on *Applewood*. I remember  
23 that case, but it's just not one people cite as frequently as  
24 those two.

25       MR. BRIDGES: Yes, Your Honor. And our reply brief

1 devotes a page to the case, and I'm hopeful that I can  
2 remember it well enough to give you what you're looking for  
3 about it, but I would point you to our reply brief on that  
4 topic as well.

5 The *Shoaf* case that *Applewood* quotes from and  
6 distinguishes and expressly limits, the *Shoaf* case actually  
7 has been cautioned and limited and distinguished numerous  
8 times, if you Shepardize it, and the *Applewood* case is the  
9 leading case, and it also is from the Fifth Circuit, that  
10 describes and cabins the effects of *Shoaf*. And in *Applewood*,  
11 what happened is a bankruptcy confirmation order became final  
12 with releases in it, and the court held that exculpatory  
13 orders in a final order from the Bankruptcy Court do not have  
14 res judicata effect and do not release claims unless those  
15 claims are enumerated in the exculpatory order. And --

16 THE COURT: Okay. So it was about specificity more  
17 than anything else, right?

18 MR. BRIDGES: Yes, Your Honor. It was a --

19 THE COURT: Okay.

20 MR. BRIDGES: -- a blanket release, a blanket --

21 THE COURT: Okay.

22 MR. BRIDGES: -- exculpatory order that didn't  
23 specify what claims were released by what parties, and  
24 therefore the parties didn't have the requisite notice.

25 In my mind, Your Honor, it's comparable to the Texas

1 Supreme Court's holdings on what's required in a settlement  
2 release in terms of a disclaimer of reliance, --

3 THE COURT: Okay. But, again, --

4 MR. BRIDGES: -- that if you aren't --

5 THE COURT: -- it's about specificity --

6 MR. BRIDGES: Yes, Your Honor.

7 THE COURT: -- more than anything else? And then  
8 we've got the U.S. Supreme Court *Espinosa* case subsequent.

9 MR. BRIDGES: Okay. Your Honor, I'm not sure what  
10 *Espinosa* you're referring to. Can you tell me why that  
11 applies?

12 THE COURT: Well, it was a confirmation order. It  
13 was in a Chapter 13 context. And there were provisions that  
14 operated to discharge student loan debt, --

15 MR. BRIDGES: Uh-huh.

16 THE COURT: -- which, of course, cannot be discharged  
17 without a 523 action, a separate adversary proceeding.  
18 Nevertheless, the confirmation order operated to do what 523  
19 suggests you cannot do, discharge student loan debt through a  
20 plan confirmation order.

21 The U.S. Supreme Court says, well, that's unfortunate that  
22 the confirmation order did something which it doesn't look  
23 like you can do, but no one ever objected or appealed. That's  
24 my recollection of *Espinosa*. So it seems to be the same  
25 holding as *Republic Supply v. Shoaf*. And what I -- why I

1 asked you to elaborate on *Applewood* is because it does seem to  
2 deal with the specificity of the order versus the  
3 enforceability, no?

4 MR. BRIDGES: Your Honor, if it's not obvious  
5 already, I'm not prepared to argue *Espinosa*. And your  
6 explanation of it is very helpful to me. I think you're right  
7 that the specificity issue from *Applewood* is what we're  
8 relying on. And it sounds like --

9 THE COURT: Okay. So, that being the case, how was  
10 this order not specific? Okay?

11 MR. BRIDGES: That's easy, Your Honor, because it  
12 doesn't say which parties are releasing which claims. And  
13 what we're talking specifically about there -- as we go  
14 through the order, I can show you the language -- but what  
15 we're talking about specifically are the ordinary negligence  
16 and breach of fiduciary duty claims that your order doesn't  
17 provide for at all. Rather, it says colorability of gross  
18 negligence or willful wrongdoing, if I remember the words  
19 precisely, that's what must be shown to pursue a case -- a  
20 cause of action against Mr. Seery, thereby -- thereby  
21 indicating that claims for mere negligence, not gross  
22 negligence, or breach of fiduciary duty, which is an even  
23 lesser standard, that those claims are prohibited entirely.

24 And by having that kind of general all-encompassing  
25 release or exculpation for potential liability involving

1 negligence, and most importantly, fiduciary duty breach under  
2 the Advisers Act, that that kind of exculpation under  
3 Applewood is not enforceable and has no res judicata effect  
4 because it wasn't -- those claims weren't enumerated in the  
5 order.

6 That for it to have the intended exculpatory effect, if  
7 that was what was intended, that the fiduciary duty claims and  
8 the parties who those claims may belong to would have to have  
9 been enumerated.

10 And indeed, that kind of specificity, what was required in  
11 Applewood, isn't even possible for a claim that hasn't yet  
12 occurred for future conduct. It's not possible to enumerate  
13 the details, any details, of a future claim, because the  
14 underlying act -- if the underlying basis, facts for that  
15 claim, haven't yet happened. It's something to happen in the  
16 future.

17 And here, that's what we're dealing with. We're dealing  
18 with conduct that took place well after the January and July  
19 2020 orders that had that exculpatory effect. Is -- is that  
20 clear?

21 THE COURT: Understood.

22 MR. BRIDGES: Thank you, Your Honor. So, the four  
23 areas of the order, the four functions that the order does  
24 that are problematic to us that led us to do what we have done  
25 are the gatekeeping function; the release; the fact that by

1 stating sole jurisdiction, that it had a jurisdiction-  
2 stripping effect; and then, finally, jurisdiction asserting,  
3 where, respectfully, Your Honor, we think to some extent the  
4 order goes beyond what this Court's jurisdiction is. And so  
5 that not only claiming exclusive jurisdiction, but claiming  
6 jurisdiction over all actions against Mr. Seery, as described  
7 in the order, is going too far.

8 And those are the four issues I want to talk about one at  
9 a time, and here -- I went two screens instead of one. There  
10 we go. And here's the order. I have numbered the highlights  
11 here out of sequence because this is the sequence that I wish  
12 to talk about them and that I think their significance to our  
13 decision applies.

14 Before we get into the words of this July 16, 2020 order,  
15 I want to mention the January order as well. Although the  
16 motion for contempt recites both orders, we don't actually  
17 think the January order applies to us, because our lawsuit  
18 against Mr. Seery is not about his role as a director at  
19 Strand in any way. We didn't make an issue of that, other  
20 than in a footnote in our brief, because we don't think that  
21 distinction matters much since the orders essentially say the  
22 same things.

23 I'm not sure that it matters whether we have potentially  
24 violated one order or two. If Your Honor finds we've violated  
25 one, I think we're on the hook regardless. If Your Honor

1 finds that we didn't violate the July order, I don't think you  
2 will find that we violated the January order, either. So my  
3 focus is on the July order.

4 The gatekeeping function comes from the preliminary  
5 language about commencing or pursuing a claim or cause of  
6 action against Mr. Seery. And it says what you want us to do  
7 first before bringing such a claim.

8 The second issue of the release comes a little bit later.  
9 It's the colorable claim of willful misconduct or gross  
10 negligence language. In other words, because only claims of  
11 willful misconduct or gross negligence can pass the bar, can  
12 pass muster under this order, that lesser claims -- ordinary  
13 negligence and breach of fiduciary duty -- that those claims  
14 are released by this order. That's the second argument.

15 Third is your reference to sole jurisdiction and the  
16 effect that that has of attempting to say that other courts,  
17 courts of original jurisdiction, do not have jurisdiction  
18 because it solely resides here. That's the third thing I want  
19 to address.

20 And then the fourth is the notion that we have to come to  
21 this Court first for any action that fits the description of  
22 an action against Mr. Seery, when some actions are, through  
23 acts of Congress, removed from what this Court has the power  
24 to address. Under 157(d) of Title 28, Your Honor, there are  
25 some kinds of actions which withdrawal of the reference is

1 mandatory, and therefore this court lacks jurisdiction to  
2 address those.

3 And so those are the four issues I want to tackle,  
4 starting with the first, the gatekeeping. Your Honor, Section  
5 28 -- Section 959 of Title 28 appears to be precisely on  
6 point. It calls -- it is called by some courts an exception  
7 to the Barton Doctrine, which we believe is the only basis,  
8 the Barton Doctrine, for this Court to claim that it has  
9 jurisdiction or sole jurisdiction and can require us to come  
10 here first. We think the Barton Doctrine is the only basis  
11 for that. We haven't seen anything in the briefing from  
12 opposing counsel indicating there was another basis for it.  
13 We think we're talking about the Barton Doctrine here as the  
14 basis for that.

15 959 is exception to the Barton Doctrine, and we think it  
16 explicitly authorizes what we have done.

17 Secondly, Your Honor, the order, the gatekeeping functions  
18 of the order are too broad because of its incorporation of the  
19 jurisdictional problems and the release problem that we'll  
20 talk about later. But for problem number one, the key issue  
21 that we're talking about is 959 as an exception to the Barton  
22 Doctrine. And I went the wrong way.

23 THE COURT: So, we could go down a lot of rabbit  
24 trails today, and I'm going to try not to do that, but are you  
25 saying the very common practice of having gatekeeping

1 provisions in Chapter 11 cases is just defective law under 28  
2 U.S.C. § 959(a)?

3 MR. BRIDGES: Can I say yes and no?

4 THE COURT: Okay.

5 MR. BRIDGES: Yes, to some extent, for some claims.  
6 No as to other claims to another extent. We are not saying  
7 gatekeeping orders are altogether wrong, --

8 THE COURT: Okay.

9 MR. BRIDGES: -- no.

10 THE COURT: Okay.

11 MR. BRIDGES: There are problems with gatekeeping  
12 orders that do more than what the law, Section 959 in  
13 particular, allows them to do.

14 THE COURT: Okay. Be more explicit. I'm not -- I  
15 think you're saying, no, except when certain situations exist,  
16 but I don't know what the certain situations are.

17 MR. BRIDGES: And Your Honor, you're exactly right.  
18 It's complicated, and it takes a long explanation. Let me  
19 start --

20 THE COURT: Okay. I really want to know, --

21 MR. BRIDGES: Yeah, me, too.

22 THE COURT: -- since I do these all the time, and  
23 most of my colleagues do.

24 MR. BRIDGES: Thank you, Your Honor. And 959 is on  
25 the screen. Managers of any property --

1 THE COURT: Uh-huh.

2 MR. BRIDGES: -- is what we're talking about,  
3 including debtors in possession. Now, it starts off by saying  
4 trustees, receivers. I mean, this is exactly what the Barton  
5 Doctrine is about, right? We're talking about trustees and  
6 receivers, but not just them. We're also talking about  
7 managers of any property, including debtors in possession, --

8 THE COURT: Uh-huh.

9 MR. BRIDGES: -- may be sued without leave of the  
10 court appointing that. That's contrary to the Barton Doctrine  
11 so far.

12 With respect to what I've numbered five here -- these  
13 numbers are mine -- the quote is directly verbatim out of the  
14 U.S. Code, but the numbering one through five is mine. With  
15 respect to what acts or transactions in carrying on business  
16 connected with such property.

17 And so, Your Honor, what we're talking about isn't Barton  
18 Doctrine is inapplicable, or you can't have a gatekeeping  
19 order for any claims, but it's about managers of property.  
20 And one of the hornbook examples of this is the grocery store  
21 that files for bankruptcy and then, when --

22 THE COURT: Slip-and-fall.

23 MR. BRIDGES: You've got it, Your Honor.

24 THE COURT: Uh-huh.

25 MR. BRIDGES: And because they're managing property,

1 --

2 THE COURT: So your cause of action, if it went  
3 forward, is the equivalent of a slip-and-fall --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: -- in a grocery store?

6 MR. BRIDGES: Yes, Your Honor.

7 THE COURT: Okay. Let me skip ahead. What about the  
8 last sentence of 959(a)?

9 MR. BRIDGES: 959(b)? Or 959(a)?

10 THE COURT: No, of 959(a).

11 MR. BRIDGES: What we're looking at here?

12 THE COURT: That's the sentence that I have always  
13 thought was one justification for a gatekeeper provision. And  
14 I know, you know, a lot of others feel the same.

15 MR. BRIDGES: Are we talking about what I have listed  
16 in number five here?

17 THE COURT: No. I'm talking about the last sentence  
18 of 959(a). Such actions, okay, shall be subject to the  
19 general equity power of such court, you know, meaning the  
20 Bankruptcy Court, so far as the same may be necessary to the  
21 ends of justice, but this shall not deprive a litigant of his  
22 right to a trial by jury.

23 Isn't that one of the provisions that lawyers sometimes  
24 rely on in arguing a gatekeeper provision is appropriate?

25 MR. BRIDGES: Certain --

1           THE COURT: You, Bankruptcy Judge, have the power,  
2 the general equity power, so far as the same may be necessary  
3 to the ends of justice?

4           MR. BRIDGES: Your Honor, you bet. Absolutely, there  
5 is equitable power to do more. There's no doubt that there  
6 are reliance -- there is reliance on that in many instances.  
7 So I'm not sure -- I'm not sure I'm responding to your point.

8           THE COURT: Well, again, I think this is the third or  
9 fourth argument down the line that really you start with in  
10 the analytical framework here, but I guess I'm just saying I  
11 always thought a gatekeeping provision was consistent,  
12 entirely consistent with 28 U.S.C. § 959(a), the last  
13 sentence.

14           MR. BRIDGES: When you're dealing --

15           THE COURT: You disagree with that?

16           MR. BRIDGES: I do, Your Honor.

17           THE COURT: Okay.

18           MR. BRIDGES: And it's not that the Court lacks  
19 equitable powers to do more. It's that those equitable powers  
20 are affected by when management of other parties, third  
21 parties' property is at issue.

22           What we're talking about is similar to yesterday's  
23 contempt order. When you set the basis of describing what it  
24 is that Highland's business is, that they're a registered  
25 investment advisor in the business of buying, selling, and

1 managing assets -- assets, of course, are property, and that  
2 property is not just Highland's, but it's third-party  
3 property, as if a railroad loses luggage belonging to its  
4 customers. Rather than the railroad with a trustee appointed  
5 having mismanaged railroad property, we're talking about  
6 third-party property here, third-party property that belongs  
7 to the CLOs, about a billion dollars of assets in these CLO  
8 SPEs that Highland manages.

9 And again, the slide that Mr. Sbaiti showed you showing  
10 Highland, yes, they manage their own assets, the assets of the  
11 Debtor, but also of the third parties, including the  
12 Charitable DAF and CLO Holdco, and that the Advisers Act  
13 imposes fiduciary duties on them that are unwaivable when  
14 they're doing that.

15 In *Anderson*, the Fifth Circuit called 959 an exception to  
16 the rule requiring court's permission for leave to sue. In  
17 *Hoffman v. City of San Diego* much more recently, relying on  
18 this statute again, the court rejected a *Barton* challenge and  
19 called it a statutory exception. And in *Barton* itself, from a  
20 century ago, the U.S. Supreme Court even acknowledged there  
21 that where a receiver misappropriated the property of another  
22 -- not the debtor's property, the property of another -- that  
23 the receiver could still be sued personally, without leave of  
24 court.

25 Absent *Barton*, absent applicability of the *Barton*

1       Doctrine, Your Honor, the gatekeeper order is problematic.

2           *Barton* applies where a court has appointed a trustee, and  
3 I don't think, Your Honor, under the circumstances in this  
4 case, that it is fair to say Mr. Seery was appointed, as  
5 opposed to approved by this Court. And it involves a  
6 trustee's actions under the powers conferred on him. The  
7 Barton Doctrine is not about a broader exculpation of the  
8 trustee.

9           Here, what the Debtor asked for in its motion for  
10 approval, approval of hiring Mr. Seery, what it asked for  
11 specifically in the motion was that the Court not interfere  
12 with corporate decisions absent a showing of bad faith, self-  
13 interest, or gross negligence, and asking the Court to uphold  
14 the board's decision to appoint Mr. Seery as the CEO as long  
15 as they are attributable to any rationale business purpose.

16          At the hearing, Your Honor, at the hearing, we've quoted  
17 your comments saying that the evidence amply shows a sound  
18 business justification and reasonable business judgment on the  
19 part of the Debtor in proposing that Mr. Seery be CEO and CRO.  
20 Your Honor, respectfully, those words don't sound like the  
21 judge using its discretion to choose -- appoint a trustee.  
22 They sound like the Court exercising deference to the business  
23 judgment of a business. And appropriately so. We don't have  
24 trouble with application of the business judgment rule. Our  
25 problem is with application of it and the Barton Doctrine.

1 Those two do not go together. A trustee has protection  
2 because it's acting under color of the court that appointed  
3 it. A court that merely deferred to someone else's  
4 appointment, that's not what the Barton Doctrine is about.  
5 The Barton Doctrine is about the court's function that the  
6 trustee takes on, not deference to the business judgment of  
7 the debtor in possession or the other fiduciary appointed by  
8 the court.

9 Problem one was the gatekeeping. Problem two is about the  
10 release and the *Applewood* case. Your Honor, again, ordinary  
11 negligence and ordinary fiduciary duty breaches do not rise to  
12 the level of gross negligence and willful misconduct. And  
13 because of that, the language of this order appears to be  
14 barring them entirely. No entity may bring a lawsuit against  
15 Mr. Seery in certain circumstances without the Bankruptcy  
16 Court doing what? Determining that the cause of action  
17 represents a colorable claim of willful misconduct or gross  
18 negligence against Mr. Seery.

19 A breach of fiduciary duty under the Advisers Act can be  
20 unintentional, it can fall short of gross negligence by miles,  
21 and to exculpate Mr. Seery from those kinds of claims entirely  
22 is to make him no longer a fiduciary. A fiduciary duty that  
23 is unenforceable makes someone not a fiduciary. That's  
24 plainly not what Mr. Seery thinks his role is. It's  
25 inconsistent with the Advisers Act. And Your Honor, the

1 notion that he would not owe his clients fiduciary duties as  
2 he manages their assets would require disclosures under the  
3 SEC regulations. It creates all kinds of problems to state  
4 that a fiduciary under the Advisers Act does not have  
5 enforceable fiduciary duties. The order appears to be  
6 releasing all of those. But for *Applewood's* specificity  
7 requirement, it would be doing that.

8 As an asset manager under the Advisers Act, Mr. Seery is  
9 managing assets belonging to CLO Holdco and The Charitable  
10 DAF. That's precisely what the District Court action is  
11 about, those fiduciary duties. And Mr. Seery, in describing  
12 these recently in testimony here -- forgive me for reading  
13 through this, Your Honor, but it is pretty short -- Mr. Seery  
14 testifies, I think, from a high level, the best way to think  
15 about the Debtor is that it's a registered investment advisor.  
16 As a registered investment advisor, which is really any  
17 advisor of third-party money over \$25 million, it has to  
18 register with the SEC and it manages funds in many different  
19 ways. The Debtor manages approximately \$200 million current  
20 values -- it was more than that at the start of the case -- of  
21 its own assets.

22 I'm pausing there, Your Honor. \$200 million of its own  
23 assets, but we're about to talk about third-party assets.

24 It doesn't have to be a registered investment advisor for  
25 those assets, but it does manage its own assets, which include

1 directly-owned securities, loans, from mostly related entities  
2 but not all, and investments in certain funds, which it also  
3 manages.

4 And then here it comes: In addition, the manager -- the  
5 Debtor manages about roughly \$2 billion, \$2 billion in total  
6 managed assets, around \$2 billion in CLO assets, and then  
7 other entities, which are hedge funds or PE style.

8 We also had to get a very good understanding of each of  
9 the funds that we manage. And as I said, the Investment  
10 Advisers Act puts a fiduciary duty on Highland Capital to  
11 discharge its duty to the investors. So while we have duties  
12 to the estate, we also have duties, as I mentioned in my last  
13 testimony, to each of the investors in the funds.

14 Now, some of them are related parties, and those are a  
15 little bit easier. Some of them are owned by Highland. But  
16 there are third-party investors in these funds who have no  
17 relation whatsoever to Highland, and we owe them a fiduciary  
18 duty both to manage their assets prudently but also to seek to  
19 manage -- maximize value.

20 Those duties do not require -- requires the opposite of  
21 what I mean. They don't merely require avoiding gross  
22 negligence or willful wrongdoing. When you're managing assets  
23 of others, the fiduciary duties that you owe are far stricter  
24 than that. The highest duty known to law is a fiduciary duty.

25 The order is inconsistent with that testimony,

1 acknowledging the fiduciary duties owed to The Charitable DAF  
2 and to CLO Holdco. It appears to release the Debtor -- maybe  
3 not the Debtor. My slide may be wrong about that. It appears  
4 to release Seery from having to uphold these duties.

5 In addition to problems with the gatekeeping under the  
6 Barton Doctrine, in addition to the release problem and  
7 *Applewood* and the unwaivable fiduciary duties under the  
8 Advisers Act, there's also a problem with telling other courts  
9 that they lack jurisdiction. Your Honor knows bankruptcy  
10 court law -- bankruptcy -- and the Bankruptcy Code far better  
11 than I do, I'm certain. But a first principle, I believe, of  
12 bankruptcy law is that this Court's jurisdiction is derivative  
13 of the District Court's. And the only doctrine I've heard of  
14 that can allow this Court to exercise exclusive jurisdiction  
15 of the District Court that it sits in is the Barton Doctrine,  
16 which, again, is very problematic to apply in this case, for  
17 the reasons we've discussed already.

18 By claiming to have -- by stating in the order that this  
19 Court has sole jurisdiction, it appears to either be inclusive  
20 of the District Court, which I understand Your Honor doesn't  
21 think her order can be read that way, but if it's not read  
22 that way, then it results in telling the District Court that  
23 it doesn't have the original jurisdiction that Congress has  
24 given it. And that's problematic in the order as well.

25 THE COURT: Let me ask you. If you think the word

1 "power" had been used, or "authority," versus "jurisdiction,"  
2 that would have cured it?

3 MR. BRIDGES: I think there would still have been  
4 other problems. Would it have cured this? I don't think so,  
5 Your Honor, because, again, I think the only basis for that  
6 power is the Barton Doctrine.

7 THE COURT: Okay.

8 MR. BRIDGES: To listen to opposing counsel, you'd  
9 think that our jurisdictional argument was entirely about the  
10 jurisdiction stripping. It's not. Frankly, Your Honor,  
11 that's maybe even a lesser point. A key problem here to is  
12 the assertion of jurisdiction, not over any of the claims, but  
13 over all of the claims, because of 157(d), Your Honor, because  
14 some claims, some causes of action, have been put outside the  
15 reach of bankruptcy, the Bankruptcy Court, and those actions  
16 may in some instances fit within your description of the cases  
17 that are precluded here.

18 That's a problem jurisdictionally with this Court's  
19 ability to say it retains jurisdiction or that it has, that it  
20 asserts jurisdiction. Over what? Any kind of claim or cause  
21 of action against Mr. Seery relating in any way to his role as  
22 the chief executive officer and chief restructuring officer of  
23 the Debtor.

24 Some claims that fit into that bucket also fit into the  
25 description in 157(d) of cases that require both consideration

1 of bankruptcy law and federal laws affecting interstate  
2 commerce or regulating it. Right? Some cases must fall into  
3 -- under 157(d), despite having something to do with Mr.  
4 Seery's role as a chief executive officer. And Your Honor,  
5 the Advisers Act fiduciary duty claims asserted by Respondents  
6 in the District Court are such claims. They cannot be decided  
7 without considering the Advisers Act.

8 There are also RICO claims that, of course, require  
9 consideration of the RICO statute. But the Advisers Act  
10 claims absolutely require consideration of both bankruptcy law  
11 and this Court's order exonerating -- exculpating Mr. Seery  
12 from some liability, in addition to the unwaivable fiduciary  
13 duties imposed by the Advisers Act.

14 The assertion of jurisdiction here blanketed, in a blanket  
15 manner, over all claims against Mr. Seery in any way related  
16 to his CEO role is a 157(d) problem that the order has no --  
17 has no solution for and we see no way around. 157(d) requires  
18 withdrawal of the reference, makes it mandatory, when a case  
19 requires considerations of federal law implicating interstate  
20 commerce.

21 Your Honor, we think we had to do it the way we did,  
22 filing in the District Court instead of filing here, in order  
23 to preserve our jurisdictional arguments. To come to this  
24 Court with a motion and then what? Immediately file a motion  
25 to withdraw the reference on our own motion here? To come

1 here and ask for a decision on colorability, when first  
2 colorability would exclude the claims that we're trying to  
3 bring, at least some of them, the mere negligence, mere  
4 fiduciary duty breaches, because they don't rise to the level  
5 necessarily of gross negligence or willful wrongdoing.

6 Your Honor, coming here and asking this Court to rule on  
7 that may well have waived our jurisdictional objections.  
8 Coming here to this Court and doing that and immediately  
9 filing a motion --

10 THE COURT: I don't get it.

11 MR. BRIDGES: The ordinary --

12 THE COURT: Subject matter jurisdiction, if it's a  
13 problem, it's not waivable.

14 MR. BRIDGES: The ordinary issue -- the ordinary  
15 waiver rule, Your Honor, is that when you come and ask for a  
16 court to rule on something, that you waive your right to -- to  
17 later -- you're estopped judicially from taking the contrary  
18 position.

19 THE COURT: Okay. Well, again, I don't get it. If  
20 you filed your motion and I ruled in a way you didn't like,  
21 you would appeal to the District Court.

22 MR. BRIDGES: Yes, Your Honor. An appeal to the  
23 District Court, we would be entitled to do. I understand, no  
24 matter what happens here, we can appeal to the District Court.  
25 That's different from whether or not, by coming here first,

1 have we waived or have we created an estoppel situation, in  
2 terms of arguing jurisdiction.

3 THE COURT: Okay.

4 MR. BRIDGES: Because of the problems with the order,  
5 we thought we were in a situation where coming here would  
6 waive rights that we could avoid waiving by asking in the  
7 District Court.

8 In other words, there was a jurisdictional paradox: How  
9 does a party ask a court to do something it believes the court  
10 lacks the power to do? That's the spot we found ourselves in.  
11 What were we supposed to do?

12 Your Honor, it is definitely a complex case. And coming  
13 into this matter with over 2,000 filings on the docket before  
14 I had ever heard of Highland was a very daunting thing, coming  
15 into this case. And whether or not there's something that we  
16 missed is certainly possible, but these orders that are the  
17 subject of the contempt motion, these orders are not things  
18 that we overlooked. These are things that we studied  
19 carefully, that we did not ignore or have disdain for, but  
20 that affected and changed our actions.

21 And in the Slide #3 from Mr. Morris's -- from Mr. Morris's  
22 presentation, in his third slide, he quotes from the first  
23 page of our motion for leave, the motion that he says exhibits  
24 our contemptuous behavior.

25 The second paragraph is kind of tiny print there, Your

1 Honor, and it's not highlighted, but I'd like to read it.  
2 Seery is not named in the original complaint, but this is only  
3 out of an abundance of caution due to the Bankruptcy Court in  
4 HCM's pending Chapter 11 proceeding having issued an order  
5 prohibiting the filing of any causes of action against Seery  
6 in any way related to his role at HCM, subject to certain  
7 prerequisites. In that order, the Bankruptcy Court also  
8 asserts sole jurisdiction over all such causes of action.

9 Your Honor, our intent was not to violate the order. Our  
10 intent was to be cautious about how we proceeded, to fully  
11 disclose what we were doing, and to do it in a District Court  
12 that absolutely could refer the matter here to this Court for  
13 a decision, but to do it in a way that didn't waive our  
14 jurisdictional arguments, that didn't waive our arguments  
15 regarding the release of the very claims we were trying to  
16 bring, by first having to prove that they were colorful claims  
17 of willful misconduct or gross negligence, when we were trying  
18 to assert claims that weren't willful negligence or gross --  
19 gross negligence or willful misconduct. That was what I was  
20 trying to say.

21 Your Honor, this was not disregard of your order. If  
22 we're wrong on the law, we're wrong on the law, but it's not  
23 that we disregarded your order or lacked respect for it. We  
24 disclosed it.

25 Mr. Morris has argued in the briefs that we attempted to

1 do this on an ex parte basis. Your Honor, we did not attempt  
2 to do this on an ex parte basis. And if there are errors,  
3 they probably are mine. I know one error is mine. On the  
4 civil cover sheet in the filing in the District Court, I noted  
5 and passed on that we should check the box for related case  
6 and list this case on there. I did not follow up to make sure  
7 that it happened, and administratively, it didn't happen. We  
8 did not check the box on the civil cover sheet. Mr. Morris is  
9 correct that we failed to do that. He's incorrect that that  
10 was sneaky or intentional. It was my error, having noticed it  
11 but not followed up.

12 Your Honor, similarly, the argument that we didn't serve  
13 them with the motion I think is disingenuous. What happened,  
14 Your Honor, is that counsel for the Debtor had agreed to  
15 accept service of the complaint itself against the Debtor  
16 before the motion for leave, and after accepting service, I  
17 was under the impression that they'd be monitoring the docket,  
18 especially when I emailed them, informed them that we were  
19 filing the motion for leave to amend, because I was required  
20 to submit a certificate of conference on that motion. I  
21 informed them in a polite email. The polite email is not  
22 quoted in their brief. It is included in the record, and it's  
23 quoted in full in our brief.

24 The email exchange indicates to them, Thank you for  
25 pointing out the Court's orders. We've carefully studied them

1 and we don't think what we're doing is a violation of those  
2 orders.

3 That we didn't serve them is because we thought they  
4 already knew that the motion was coming and would be  
5 monitoring the docket, and we didn't know which lawyers they  
6 were going to have make an appearance in that case, so we  
7 wouldn't have known who to serve. But if not serving them --  
8 first, the Rules do not require that service. But if not  
9 serving them out of politeness --

10 THE COURT: Mr. Morris is standing up. Did --

11 MR. MORRIS: I move to strike all of this, Your  
12 Honor. If Counsel wants to take the stand and raise his hand,  
13 he should testify under oath. I'm just going to leave it at  
14 that. He's not on their witness list.

15 THE COURT: All right. I overrule. You can  
16 continue.

17 MR. BRIDGES: Thank you, Your Honor.

18 If failure to serve them was an error, it was mine. I  
19 know of no rule that requires it.

20 THE COURT: Can I ask you, you were talking about the  
21 cover sheet mistake in not checking the box. What about your  
22 jurisdictional statement in the actual complaint not  
23 mentioning 28 U.S.C. § 1334 as a possible basis for subject  
24 matter jurisdiction? Do you think that was a mistake as well,  
25 or was that purposeful, not necessary?

1                   MR. BRIDGES: Candidly, Your Honor, standing here  
2 right now, I have no recollection whatsoever of it.

3                   THE COURT: You mention 28 U.S.C. § 1331, and then  
4 1367 supplemental jurisdiction, but you don't mention 1334.

5                   MR. BRIDGES: I suspect it's true, but Mr. Sbaiti  
6 would have written that.

7                   THE COURT: Okay.

8                   MR. BRIDGES: I have no recollection of --

9                   THE COURT: Okay.

10                  MR. BRIDGES: -- making any decision at all --

11                  THE COURT: All right.

12                  MR. BRIDGES: -- with regards to that.

13                  THE COURT: Okay.

14                  MR. BRIDGES: Your Honor, you've been very patient  
15 with a very long opening argument, and I'm very grateful for  
16 that. Please know that we take this Court's order seriously.  
17 We voluntarily appeared here before the Court ordered us to do  
18 so by filing our motion asking for a modification of the order  
19 we're accused now of having been in violation of.

20                  And the last thing I'd like to say, Your Honor, Mr.  
21 Morris's brief claims that the first he knew of the motion,  
22 the motion seeking leave to add Mr. Seery to the District  
23 Court claim, the first he knew of that was when Mr. Sbaiti  
24 forwarded him the District Court's order dismissing that  
25 motion, denying that motion without prejudice.

1       Your Honor, in a civil contempt proceeding, where the  
2 issue is compensating, not punishing, if the aggrieved party  
3 didn't even know about the action until it had been denied by  
4 the District Court, we submit that there can be no harm from  
5 that having taken place.

6       That's all I have for opening. Thank you, Your Honor.

7           THE COURT: All right. Thank you.

8       Before we give you a time check, do we have other opening  
9 statements?

10          MR. ANDERSON: Yes. Yes, Your Honor. Michael  
11 Anderson on behalf of Mr. Patrick. If we need to take a  
12 break, that's fine, too.

13          THE COURT: Well, how long do you plan to use?

14          MR. ANDERSON: No more than ten minutes, for sure.

15          THE COURT: Let's go ahead and do that, and then  
16 we'll take a break.

17          MR. POMERANTZ: Your Honor, after, I would ask the  
18 opportunity to respond to Mr. Bridges' argument. Probably  
19 another ten minutes.

20          THE COURT: All right. Let's go ahead and take a  
21 ten-minute break. And Mr. Taylor, you're going to have  
22 something, because you --

23          MR. TAYLOR: Five.

24          THE COURT: Okay. We'll take a ten-minute break.  
25 And Nate, can you give them a time?

1                   THE CLERK: I'm showing it was about 59-1/2 minutes.

2                   THE COURT: Fifty-nine and a half? And is that  
3 subtracting some for my questioning?

4                   THE CLERK: I stopped whenever you talked, maybe a  
5 little over --

6                   THE COURT: Okay. So he stopped it whenever I asked  
7 questions and you answered, so 59 minutes has been used by the  
8 Respondents.

9                   All right. We'll take a ten-minute break. We'll come  
10 back at 11:35.

11                  THE CLERK: All rise.

12                  (A recess ensued from 11:25 a.m. to 11:37 a.m.)

13                  THE COURT: All right. We're going back on the  
14 record in the Highland matter. We have further opening  
15 statements. Counsel, you may proceed.

16                  OPENING STATEMENT ON BEHALF OF MARK PATRICK, RESPONDENT

17                  MR. ANDERSON: Thank you. May it please the Court,  
18 Counsel. Michael Anderson on behalf of Respondent, Mark  
19 Patrick.

20                  Your Honor, after listening to this and looking at the  
21 filings in this case, this issue of whether there's contempt  
22 -- and I would argue there's not -- is ripe for decision. We  
23 have no real undisputed facts for purposes of the contempt  
24 issue. We have your Court's July order, the subject of Mr.  
25 Bridge's arguments. We have the Plaintiffs in the underlying

1 lawsuit at issue. They commenced the lawsuit in April of this  
2 year. There's absolutely nothing improper about that filing.  
3 It's not subject to the contempt. A week later, there is a  
4 motion for leave to add Mr. Seery. That's the issue. There's  
5 no dispute over that. There's no dispute that Mr. Patrick  
6 authorized the filing of the motion for leave.

7 And so then the question becomes we look at the Court's  
8 July order, did a motion for leave, did that violate the terms  
9 of the order? The motion for leave is not commencing a  
10 lawsuit. It's also not pursuing a claim, because whether or  
11 not the Court grants the motion, denies the motion, or  
12 whatever the Court does, nothing happened, because the day  
13 after the motion for leave was filed it was dismissed *sua*  
14 *sponte* without prejudice because not all parties had been  
15 served in the case.

16 It was permission asked one day. The matter was mooted  
17 the following day by the District Court. And so that is  
18 completely undisputed.

19 And so the question is, is asking permission, is that  
20 commence? I think everybody says there's no way that's  
21 commencing a lawsuit because you have asked permission. The  
22 question, then, is it pursuing a claim? And the argument,  
23 well, no, that's not pursuing a claim; it's asking permission.

24 And I think it's also important to note that when the  
25 motion for leave was filed, there were no secrets there. I

1 mean, I'm coming in this after the fact, representing Mr.  
2 Patrick. You look at a motion for leave, and right there on  
3 Page 1 it talks about Your Honor's order. Page 2, it quotes  
4 the order and it gives the reasons, there's arguments being  
5 made as to why that order doesn't bar adding Mr. Seery as a  
6 defendant in the lawsuit, many of the arguments that Mr.  
7 Bridges made.

8 So that's where we are. And so when I hear, hey, we've  
9 got six hours, three hours and three hours, and we're going to  
10 split this up, you know, maybe too simplistic from Fort Worth,  
11 but I'm like, wait a second, this is all undisputed. It's  
12 totally undisputed. The -- whether or not the prior order is  
13 enforceable or not enforceable, those are all legal arguments.  
14 You know, no witnesses are necessary for that. And as I  
15 understood, right before we broke, counsel stood up and he's  
16 going to do what generally doesn't happen in opening  
17 statements, which is respond to opening statements, which  
18 shows that that's a legal issue.

19 And so it really does come down to undisputed facts.  
20 There's no testimony. No -- nothing is necessary. And a lot  
21 of what this comes down to is the old statement, you know, is  
22 it better to ask forgiveness or permission? And usually that  
23 statement comes up when somebody has already done something:  
24 Hey, I'm going to go do it anyway and I'll ask for forgiveness  
25 later. Well, what the Plaintiffs in the underlying case did

1 was ask permission. Motion for leave. That is not  
2 contemptuous. And there's literally no damages. As was  
3 pointed out, by the time counsel found out, it had already  
4 been dismissed.

5 The last thing I want to point out, Your Honor, is that  
6 the argument from opposing counsel was, well, under Rule 15 of  
7 the Federal Rules of Civil Procedure, since parties hadn't  
8 answered yet, the Plaintiffs in the underlying case could have  
9 just simply added Mr. Seery as a defendant and moved on that  
10 way, but then that would be another ball of wax and then we  
11 would be addressing issues as far as whether or not there is a  
12 violation of the Court's order, notwithstanding Mr. Bridge's  
13 arguments. But then we would have those issues. But that's  
14 not what happened. Everybody knows that's not what happened.  
15 It was a motion for leave that was resolved the following day.

16 And so, Your Honor, for those reasons, and those  
17 undisputed reasons, we would request that the Court at the end  
18 of this hearing deny the request for sanctions and a contempt  
19 finding against our client, Mr. Patrick.

20 Mr. Phillips is going to address one brief issue  
21 bankruptcy-wise I believe that was raised earlier.

22 THE COURT: Okay. Mr. Phillips?

23 MR. PHILLIPS: Your Honor, thank you very much.  
24 Louis M. Phillips on behalf of Mark Patrick.

25 The only thing that I would point out, Your Honor, and I'm

1 going to do -- try to simplistically, because that's about the  
2 level at which I operate, boil down the questions about the  
3 order.

4 This order was an employment order. The problem that Mr.  
5 Bridges has elucidated to Your Honor is that the precise  
6 effect, one of the precise effects of that order is to bar the  
7 claims of third parties that arise into the future on the  
8 basis of the employment of Mr. Seery, because the order  
9 required that all claims asserting gross negligence or willful  
10 misconduct need to be brought before you to determine that  
11 they're colorable.

12 One question I have is, does it apply to the lawsuit that  
13 was filed? Doesn't apply unless the effect of the order was  
14 to release those claims and preclude any party from bringing  
15 those claims at all. And while you can say correctly that  
16 this Court issues gatekeeper orders all of the time, one thing  
17 I cannot imagine that you would say is that in employment  
18 orders you release claims of third parties existing and as may  
19 arise in the future that could be brought against the party  
20 employed to be a CRO of a debtor, who, by his own testimony,  
21 says we do all kinds of stuff in the billions of dollars for  
22 third parties that we owe fiduciary duties to.

23 There's no way, Your Honor, that you were considering your  
24 July order to bar third-party claims arising from breach of  
25 fiduciary duties by Mr. Seery to third parties who held third-

1 party claims that did not involve some assertion that, in his  
2 capacity as CRO, he was in some way acting within the scope of  
3 his authority as CRO for the Debtor and yet committed  
4 negligence against the Debtor.

5 Now, if the order was asserting that you know what a lot  
6 of people in this courtroom know, that the standard of  
7 liability for a CRO doing work for a debtor, just like the  
8 standard of liability for the president of a corporation or an  
9 officer of the corporation, is as long as you're within the  
10 course and scope of your employment, your actions for the  
11 corporation have -- can -- the corporation takes care of you  
12 because there's no personal claim unless you're outside the  
13 scope, and you're outside the scope if you commit gross  
14 negligence or willful misconduct.

15 That, if you're restating the standard of care and  
16 standard of liability for a CRO, we have no problem with that,  
17 because Mr. Patrick did not authorize a cause of action  
18 arising against Mr. Seery against the Debtors for damage to  
19 the Debtors. He authorized the filing of a complaint in the  
20 District Court with jurisdiction for a third-party claim for  
21 breach of a fiduciary duty to a third party that Mr. Seery  
22 admits he owes, and then sought leave because they didn't  
23 understand the order that Your Honor issued. It couldn't have  
24 been to release the breach of fiduciary duty claims that  
25 wouldn't rise to gross negligence or willful misconduct, it

1 couldn't be that, but it might be. But if it did, under an  
2 employment order? That's very different from *Espinosa*, that's  
3 very different from *Shoaf*, when you're at the end of a case in  
4 a confirmation of a plan and you're talking about matters  
5 arising in the past.

6 This order, if it has the effect it could be read to have,  
7 precludes any third party from asserting a breach of fiduciary  
8 duty against Seery for actions that violate the duty to that  
9 third party, when Seery's biggest job, it looks to us like, is  
10 running third-party money. That could not have been what Your  
11 Honor was thinking.

12 And so all I'm pointing out is I'm trying to distill down.  
13 The lawsuit doesn't involve gross negligence or willful  
14 misconduct allegations. It involves breach of fiduciary duty,  
15 breach of the Advisers Act, et cetera, et cetera. Mr. Patrick  
16 authorized that lawsuit.

17 Now, what we're here for today is to determine whether the  
18 complaint, which was not against the Debtor -- which was not  
19 against Seery, the motion for leave, which did not -- all they  
20 did was ask for permission, not forgiveness. And we can't  
21 understand how the Debtor should be saying, all they had to do  
22 was amend. Well, if they amended, would we be in hotter water  
23 than we are today for asking for permission to sue? I think  
24 we would have been, that should have been the prescribed  
25 course, when we are more concerned and we are more risk-averse

1 by asking for leave rather than just amending by right.  
2 Absolutely, that makes no sense. We can't be held to be more  
3 contemptuous because we asked for permission, when we could  
4 have just sued him, because they're saying asking for  
5 permission was wrong. Certainly, suing him would have been  
6 wrong. That would have been easier.

7 THE COURT: But Mr. Phillips, the issue is you all  
8 didn't come to the Bankruptcy Court and ask permission.

9 MR. PHILLIPS: Look at your order, Your Honor.

10 THE COURT: It's right in front of me.

11 MR. PHILLIPS: Right. That order either doesn't  
12 apply to the claims that were brought or it released the  
13 claims that were brought. That's our point. It couldn't have  
14 released them. Does it apply to them? Thank you.

15 THE COURT: Okay. Mr. Taylor?

16 MR. TAYLOR: Good morning.

17 THE COURT: Good morning.

18 OPENING STATEMENT ON BEHALF OF JAMES DONDERO

19 MR. TAYLOR: Your Honor, Clay Taylor on behalf of Jim  
20 Dondero. I'll be very brief because I know we've already  
21 spent a lot of time on opening argument. But I do think it is  
22 appropriate to, one, first look at who brought the lawsuit,  
23 CLO Holdco & DAF. That was authorized -- it's undisputed it  
24 was authorized by Mr. Patrick. There is no dispute about  
25 that. There's no dispute who the Plaintiffs are. But yet my

1 client is up here as an alleged violator.

2 I think it's very clear, as all the parties have said,  
3 there's no dispute as to there's an order, there was a  
4 complaint, and there was a motion for leave.

5 It seems to me that the rest of the evidentiary hearing  
6 that you may be about to go through is going to be about pin  
7 the blame on Mr. Dondero. It is undisputed that he is not a  
8 control person for the DAF or CLO Holdco. The only type of  
9 evidence you will hear is going to be insinuation that he  
10 somehow controls Mr. Patrick and used to control Mr. Scott.  
11 There will be no direct evidence that he authorized this or  
12 that he's the control person and the proper corporate  
13 authorized representative that signed off on the --

14 It seems to me, Your Honor, first of all, that's a  
15 discrete issue that should be able to be decided separately  
16 from this, and the first gating issue is, was there indeed a  
17 violation of this Court's order? It would seem to me that  
18 there is no disputes about those facts and that we should  
19 bifurcate that, and if you then find that there is a violation  
20 and find that there is any even need to move into who the  
21 alleged violators are, that then we could have that  
22 evidentiary portion. But there is no reason to do that now  
23 before there's even been found to be a violation.

24 THE COURT: All right. Thank you.

25 All right. Well, someone made the point rebuttals in

1 opening statements are not very common, --

2 MR. POMERANTZ: Your -- Your --

3 THE COURT: -- but you can use your three hours  
4 however you want.

5 OPENING STATEMENT ON BEHALF OF THE DEBTOR

6 MR. POMERANTZ: Your Honor, I didn't intend to stand  
7 up.

8 THE COURT: Okay.

9 MR. POMERANTZ: I also didn't intend to have the  
10 motion to modify the sealing order presented to Your Honor,  
11 which it was in the course of that opening argument. And  
12 despite your comments at the beginning of the hearing, the  
13 Movants have taken Your Honor down a series of rabbit holes  
14 that have really no relevance to the contempt motion. And  
15 notwithstanding, as I said, your ruling that basically the  
16 contempt would go first and the modification would go second,  
17 there they were, persistent in making all the arguments why  
18 this Court should modify the order.

19 They're just really trying to obfuscate the simple issue  
20 that Mr. Morris presented and raised at the beginning of the  
21 hearing: Did they violate the order by pursuing a claim? We  
22 think the answer is undoubtedly yes.

23 I'm not going to try to address each of the issues they  
24 raised in connection with the modification motion in detail.  
25 I have a lengthy presentation. I'll do it at the appropriate

1 time. But there are a few issues I want to address. I want  
2 to address one of the last points Mr. Bridges raised first.  
3 If they thought that the order was a problem, they could have  
4 filed their motion to modify that order before Your Honor.  
5 They could have had that heard first. There was no statute of  
6 limitations issue in connection with the HarbourVest matter.  
7 They could have come to Your Honor to do that. But no, they  
8 didn't. They went to the District Court first, and it was  
9 only after we filed our contempt motion that they came back  
10 and said, well, Your Honor, you should modify the order.  
11 Their argument that if they did that there would have been  
12 waiver and estoppel is just an after-the-fact justification  
13 for what they did and what they tried to do, which was  
14 unsuccessful. They tried to have the District Court make the  
15 decision.

16 And why? Your Honor, they've filed motions to recuse  
17 before Your Honor. They -- they -- it's no secret the disdain  
18 they have for Your Honor's rulings as it relates to them.  
19 They wanted to be out of this courtroom and in another  
20 courtroom.

21 And their belated argument, Mr. Bridges falling on the  
22 sword, that they failed to check the box, inadvertent, it's on  
23 me, it's very curious. Because if they had done so and had  
24 referred to the correct 1334 jurisdictional predicate, as Your  
25 Honor had mentioned, the complaint would have been referred to

1 this Court and the entire trajectory of the proceedings would  
2 have been different. They would have had the opportunity to  
3 take their shot to go to District Court and argue that your  
4 order didn't apply.

5 Your Honor, they say the January 9th order is not  
6 relevant. It is entirely relevant. It covered the  
7 independent directors and their agents. Yes, Mr. Seery is an  
8 independent director, but he was also an agent of the  
9 independent directors and carried out the duties. You heard  
10 argument at the July 16th hearing that Mr. Seery had been  
11 acting as the chief executive officer for several months. And  
12 why is it important? Mr. Bridges said, well, if we violated  
13 one order, we violated the other. It's important because,  
14 Your Honor, number one, Mr. Dondero supported that order. We  
15 would never have had an independent board in this case if Mr.  
16 Dondero, the decision-making -- of the Debtor at that time,  
17 supported that order and supported the exculpations that are  
18 now claimed to have been invalid.

19 And also Your Honor heard testimony at the confirmation  
20 hearing that the independent directors would never have taken  
21 this job, would never have taken this job because of the  
22 potential for litigation, litigation that we've now had to  
23 endure for several months. So to come back 16 months later  
24 and say, well, you know, you couldn't really exonerate them,  
25 it's really an employment order: It was an employment order.

1 They know it. We know it. Your Honor knows it. It was a  
2 resolution of corporate governance issues that changed the  
3 whole trajectory of the case, and luckily it -- luckily, Your  
4 Honor approved it.

5 The question just is whether they violated the order,  
6 period. And I'll have a lot to say about res judicata, but I  
7 won't go in too much in detail, but I will just briefly  
8 address their arguments. They're correct and the Court is  
9 correct that there's a difference between *Applewood* and *Shoaf*.  
10 And Your Honor got the exact difference. In one case, a  
11 release was not specific, *Applewood*. In one case it was.  
12 *Shoaf* hasn't been discredited by *Applewood*. It was different  
13 facts. In fact, *Shoaf* relied on two Supreme Court cases, the  
14 *Stoll* case and the *Chicot* case, both for the propositions that  
15 a court that enters an order, a clear order, even if it didn't  
16 have jurisdiction, that cannot be attacked in res judicata.  
17 So here what we have is clear, unambiguous, you come to this  
18 Court before commencing or pursuing a claim. That's the  
19 clarity. The focus on the releases, that's not what we're  
20 here for today, that's not what we're here for on a contempt  
21 motion, on whether the release covered them or it didn't cover  
22 them. We're here on the clear issue of did they violate the  
23 language, and we submit that they did.

24 And similarly, *Espinosa* applies. Your Honor, just to  
25 quote some language, "Appellees could have moved to remand the

1 action to state court after it improperly -- after its  
2 improper removal to the federal court or challenge the  
3 district court's exercise in jurisdiction on direct appeal.  
4 Because they did neither, they are now barred by principles of  
5 res judicata."

6 Res judicata actually does apply, and I will speak about  
7 it in much more detail in the modification motion.

8 With respect to *Barton*, Your Honor, we disagree with their  
9 argument that Mr. Seery is not a court-appointed agent. We've  
10 briefed it extensively in our motion to modify. *Barton*  
11 applies to debtors in possession. *Barton* applies to general  
12 partners of the debtor. *Barton* applies to chief restructuring  
13 orders -- officers who are approved by the debtor. And it  
14 applies to general counsel who are appointed by the chief  
15 restructuring order. Officer.

16 So the argument that *Barton* is somehow inapplicable is  
17 just wrong. Your Honor knows that. Your Honor has written  
18 extensively on *Barton* in connection with your *Ondova* opinion.

19 Some of the argument about 959 is all wrong, as well.  
20 Your Honor got it right that 959 applies to slip-and-fall  
21 cases or torts, injuries to parties that are strangers to this  
22 process. There is a legion of cases that I will cite to Your  
23 Honor in connection with argument. 959 does not apply here.  
24 There's nothing more core to this case than the transactions  
25 surrounding the resolution of the HarbourVest claims.

1       We also disagree, Your Honor, that the complaint is  
2 subject to mandatory withdrawal of the reference. We've --  
3 one of our exhibits in the motion to modify is our motion to  
4 enforce the reference. We think Movants have it completely  
5 wrong. This is not the type of case that will be subject to  
6 withdrawal -- mandatory withdrawal of the reference, and in  
7 any event, for this contempt motion, it's irrelevant.

8       And they argue -- one of the other points Mr. Bridges  
9 raises is that, because this Court would not have had  
10 jurisdiction under 157 because of the mandatory withdrawal,  
11 then Your Honor could not legally act as a gatekeeper. But  
12 they haven't addressed *Villegas v. Schmidt*. We've raised it  
13 throughout this case. And again, in these series of  
14 pleadings, they don't even address it. And *Villegas v.*  
15 *Schmidt* was a *Barton* case. It was a *Barton* case where the --  
16 where the argument was that *Barton* does not apply because it's  
17 a *Stern* claim and the Bankruptcy Court would not have  
18 jurisdiction. And *Villegas* said no, it does apply. And Your  
19 Honor even cited that in your *Ondova* case. And why does it  
20 apply? Because there's nothing inconsistent with a Bankruptcy  
21 Court having exclusive decision to make a *Barton*  
22 determination.

23       In fact, in that case *Villegas* said, you can't go to the  
24 District Court for that decision, it is the Bankruptcy Court's  
25 decision.

1       So, again, it's a red herring, Your Honor. Your Honor had  
2 the ability to act as an exclusive gatekeeper for these types  
3 of actions.

4       With that, Your Honor, I'll leave the rest of my argument  
5 for the next motion.

6           THE COURT: All right. Thanks.

7           All right. Nate, let's give everyone their time.

8           THE CLERK: That was just about eight and a half  
9 additional from the Debtor, and then altogether the other ones  
10 were just shy of fourteen minutes. Thirteen minutes and fifty  
11 seconds for the other three combined. Do you want me to --

12           THE COURT: Yes, I meant for Debtor combined versus  
13 --

14           THE CLERK: Oh. Oh.

15           THE COURT: Respondents combined.

16           THE CLERK: So that would be twenty one and a half  
17 the Debtor. Let me do the math on the other one. Be an hour  
18 twelve minutes and fifty seconds for --

19           THE COURT: Okay. All right. Got that? Debtors  
20 used a total of twenty one and a half minutes; Responders have  
21 used an hour twelve minutes and fifty seconds.

22           All right. Mr. Morris, you may call your first witness.

23           MR. MORRIS: Thank you very much, Your Honor. The  
24 Debtor calls Mark Patrick.

25           THE COURT: All right. Mr. Patrick? Please approach

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1 our witness stand and I'll swear you in. Please raise your  
2 right hand.

3 (The witness is sworn.)

4 THE COURT: All right. Please take a seat.

5 MARK PATRICK, DEBTOR'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Good afternoon, Mr. Patrick.

9 A Good afternoon.

10 Q Can you hear me okay?

11 A Yes, I can.

12 Q Okay. You have before you several sets of binders.

13 They're rather large. But when I deposed you on Friday, we  
14 did that virtually. Now, I may direct you specifically to one  
15 of the binders or one of the documents from time to time, so I  
16 just wanted you to know that those were in front of you and  
17 that I may be doing that.

18 Mr. Patrick, since March 1st, 2001 [sic], you've been  
19 employed by Highland Consultants, right?

20 A I believe the name is Highgate Consultants doing business  
21 as Skyview Group.

22 Q Okay. And that's an entity that was created by certain  
23 former Highland employees, correct?

24 A That is my understanding, correct.

25 Q And your understanding is that Mr. Dondero doesn't have an

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1 ownership interest in that entity, correct?

2 A That he does not. That is correct.

3 Q And your understanding is that he's not an employee of  
4 that -- of Skyview, correct?

5 A That is correct.

6 Q Prior to joining Skyview on March 1st, you had worked at  
7 Highland Capital Management, LP for about 13 years, correct?

8 A Correct.

9 Q Joining in, I believe, early 2008?

10 A Correct.

11 Q Okay. I'm going to refer to Highland Capital Management,  
12 LP from time to time as HCMLP. Is that okay?

13 A Yes.

14 Q While at HCMLP, you served as a tax counselor, correct?

15 A No, I would like to distinguish that. I did have the  
16 title tax counsel. However, essentially all my activities  
17 were in a non-lawyer capacity, being the client  
18 representative. I would engage other outside law firms to  
19 provide legal advice.

20 Q Okay. So you are an attorney, correct?

21 A Yes, I am.

22 Q But essentially everything you did at Highland during your  
23 13 years was in a non-lawyer capacity, correct?

24 A Correct.

25 Q In fact, you didn't even work in the legal department; is

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1 that right?

2 A That is correct. I worked for the tax department.

3 Q Okay. Let's talk about how you became the authorized  
4 representative of the Plaintiffs. You are, in fact,  
5 authorized representative today of CLO Holdco, Ltd. and  
6 Charitable DAF, LP, correct?

7 A Charitable DAF Fund, LP. Correct.

8 Q And those are the two entities that filed the complaint in  
9 the United States District Court against the Debtor and two  
10 other entities, correct?

11 A Correct.

12 Q And may I refer to those two entities going forward as the  
13 Plaintiffs?

14 A Yes.

15 Q You became the authorized representative of the Plaintiffs  
16 on March 24th, 2021, the day you and Mr. Scott executed  
17 certain transfer documents, correct?

18 A Correct.

19 Q And you had no authority to act on behalf of either of the  
20 Plaintiffs before March 24th, correct?

21 A Correct.

22 Q The DAF controls about \$200 million in assets, correct?

23 A The Plaintiffs, you mean? CLO Holdco and Charitable DAF  
24 Fund, LP.

25 Q Yes.

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1 A Around there.

2 Q Okay. Let me try and just ask that again, and thank you  
3 for correcting me. To the best of your knowledge, the  
4 Plaintiffs control about \$200 million in assets, correct?

5 A Net assets, correct.

6 Q Okay. And that asset base is derived largely from HCMLP,  
7 Mr. Dondero, or Mr. Dondero's trusts, correct?

8 A Can you restate that question again, Mr. Morris?

9 Q Sure. The asset base that you just referred to is derived  
10 largely from HCMLP, Mr. Dondero, or donor trusts?

11 A The way I would characterize it -- you're using the word  
12 derived. I would characterize it with respect to certain  
13 charitable donations --

14 Q Uh-huh.

15 A -- that were -- that were made at certain time periods,  
16 where the donors gave up complete dominion and control over  
17 the respective assets and at that time claimed a federal  
18 income tax deduction for that.

19 I do -- I do believe that, as far as the donor group, as  
20 you specified, Highland Capital Management, I recall, provided  
21 a donation to a Charitable Remainder Trust that eventually had  
22 expired and that eventually such assets went into the  
23 supporting organizations. And then I do believe Mr. Dondero  
24 also contributed to the Charitable Remainder Trust No. 2,  
25 which seeded substantial amounts of the original assets that

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1 were eventually composed of the \$200 million. And then from  
2 time to time I do believe that Mr. Dondero's trusts made  
3 charitable donations to their respective supporting  
4 organizations.

5 Q Okay. Thank you.

6 A Is that responsive?

7 Q It is. It's very responsive. Thank you very much. So,  
8 to the best of your knowledge, the charitable donations that  
9 were made that form the bases of the assets came from those  
10 three -- primarily from those three sources, correct?

11 A Well, you know, there's two different trusts. There's the  
12 Dugaboy Trust and the Get Good Trust.

13 Q Okay.

14 A Then you have Mr. Dondero and Highland Capital Management.  
15 So I would say four sources.

16 Q Okay. All right. Thank you. Prior to assuming your role  
17 as the authorized representative of the Plaintiff, you had  
18 never had meaningful responsibility for making investment  
19 decisions, correct?

20 A I'm sorry. You kind of talk a little bit fast. Please  
21 slow it down --

22 Q That's okay.

23 A -- and restate it. Thank you.

24 Q And I appreciate that. And any time you don't understand  
25 what I'm saying or I speak too fast, please do exactly what

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1 you're doing. You're doing fine.

2 Prior to assuming your role as the authorized  
3 representative of the Plaintiffs, you never had any meaningful  
4 responsibility making investment decisions. Is that correct?

5 A To whom?

6 Q For anybody.

7 A Well, during my deposition, I believe I testified that I  
8 make investment decisions with respect to my family. Family  
9 and friends come to me and they ask me for investment  
10 decisions. I was -- in my deposition, I indicated to you that  
11 I was a board member of a nonprofit called the 500, Inc. They  
12 had received a donation of stock in Yahoo!, and the members  
13 there looked to me for financial guidance. As an undergrad at  
14 the University of Miami, I was a -- I was a finance major, and  
15 so I do have a variety of background with respect to  
16 investments.

17 Q Okay. So you told me that from time to time friends and  
18 family members come to you for investing advice. Is that  
19 right?

20 A That is correct.

21 Q And when you were a young lawyer you were on the board of  
22 a nonprofit that received a donation of Yahoo! stock and the  
23 board looked to you for guidance. Is that correct?

24 THE COURT: Just a moment. I think there's an  
25 objection.

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1 MR. MORRIS: Uh-huh.

2 THE COURT: Go ahead.

3 MR. ANDERSON: So far -- relevance, Your Honor. This  
4 is way out of the bounds of the contempt proceeding. You  
5 know, what he did as a young person with Yahoo! stock. We're  
6 here to -- he authorized the lawsuit. They filed the lawsuit.  
7 That's it. Getting into all this peripheral stuff is  
8 completely irrelevant.

9 THE COURT: Your response?

10 MR. MORRIS: My response, Your Honor, is very simple.  
11 Mr. Patrick assumed responsibility, and you're going to be  
12 told that he exercised full and complete authority over a \$200  
13 million fund that was created by Mr. Dondero, --

14 THE COURT: Okay.

15 MR. MORRIS: -- that funds -- that is funded  
16 virtually by Mr. Dondero, and for which -- Mr. Patrick is a  
17 lovely man, and I don't mean to disparage him at all -- but he  
18 has no meaningful experience in investing at all.

19 THE COURT: All right. Counsel, I overrule. I think  
20 there's potential relevance.

21 And may I remind people that when you're back at counsel  
22 table, please make sure you speak your objections into the  
23 microphone. Thank you.

24 BY MR. MORRIS:

25 Q When you were a young lawyer, sir, you were on the board

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1 of a nonprofit that received a donation of Yahoo! stock and  
2 the board looked to you for guidance, correct?

3 A Yes, correct.

4 Q And -- but during your 13 years at Highland, you never had  
5 formal responsibility for making investment decisions,  
6 correct?

7 A That is correct.

8 Q Yeah. In fact, other than investment opportunities that  
9 you personally presented where you served as a co-decider, you  
10 never had any responsibility or authority to make investment  
11 decisions on behalf of HCMLP or any of its affiliated  
12 entities, correct?

13 A That is correct.

14 Q And at least during your deposition, you couldn't identify  
15 a single opportunity where you actually had the authority and  
16 did authorize the execution of a transaction on behalf of  
17 HCMLP or any of its affiliates, correct?

18 A Correct.

19 Q And yet today you are now solely responsible for making  
20 all investment decisions with respect to a \$200 million  
21 charitable fund, correct?

22 A Yes, but I get some help. I've engaged an outside third  
23 party called ValueScope, and they have been as -- effectively  
24 working as a "gatekeeper" for me, and I look to them for  
25 investment guidance and advice, and I informally look to Mr.

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1 Dondero since the time period of when I took control on March  
2 24th for any questions I may have with respect to the  
3 portfolio. So I don't feel like I'm all by myself in making  
4 decisions.

5 Q Okay. I didn't mean to suggest that you were, sir, and I  
6 apologize if you took it that way. I was just asking the  
7 question, you are the person now solely responsible for making  
8 the investment decisions, correct?

9 A Yes.

10 Q Okay. Let's talk about the circumstances that led to the  
11 filing of the complaint for a bit. On April 12, 2021, you  
12 caused the Plaintiffs to commence an action against HCMLP and  
13 two other entities, correct?

14 A Correct.

15 Q Okay. One of the binders -- you've got a couple of  
16 binders in front of you. If you look at the bottom, one of  
17 them says Volume 1 of 2, Exhibits 1 through 18. And if you  
18 could grab that one and turn to Exhibit 12. Do you have that,  
19 sir?

20 A It says -- it says the original complaint. Is that the  
21 right one?

22 Q That is the right one. And just as I said when we were  
23 doing this virtually last Friday, if I ask you a question  
24 about a particular document, you should always feel free to  
25 review as much of the document as you think you need to

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1 competently and fully answer the question. Okay?

2 A Okay. Thank you.

3 Q All right. You instructed the Sbaiti firm to file that  
4 complaint on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And to the best of your recollection, the Plaintiffs  
7 returned -- retained the Sbaiti firm in April, correct?

8 A Correct.

9 Q So the Sbaiti firm was retained no more than twelve days  
10 before the complaint was filed, correct?

11 A Correct.

12 Q You personally retained the Sbaiti firm, correct?

13 A Correct.

14 Q And the idea of filing this complaint originated with the  
15 Sbaiti firm, correct?

16 A Correct.

17 Q Before filing -- withdrawn. Before becoming the  
18 Plaintiffs' authorized representative, you hadn't had any  
19 communications with anyone about potential claims that might  
20 be brought against the Debtor arising out of the HarbourVest  
21 settlement, correct?

22 A That is correct.

23 Q Now, after you became the Plaintiffs' authorized  
24 representative, Mr. Dondero communicated with the Sbaiti firm  
25 about the complaint that's marked as Exhibit 12, correct?

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1 A Yes. After he brought certain information to myself and  
2 then that I engaged the Sbaiti firm to launch an  
3 investigation, I also wanted Mr. Dondero to work with the  
4 Sbaiti firm with respect to their investigation of the  
5 underlying facts.

6 Q Okay. Mr. Dondero did not discuss the complaint with you,  
7 but he did communicate with the Sbaiti firm about the  
8 complaint, correct?

9 A I believe -- yeah. I heard you slip in at the end "the  
10 complaint." I know he communicated with the Sbaiti firm. I  
11 can't -- I can't say what he said or didn't say with respect  
12 to the -- the actual complaint.

13 Q Okay. But Mr. Dondero got involved in the process  
14 initially when he brought some information to your attention  
15 concerning the HarbourVest transaction, correct?

16 A Correct.

17 Q And he came to you with the HarbourVest information after  
18 you assumed your role as the authorized representative of the  
19 Plaintiffs on March 24th, correct?

20 A That is correct.

21 Q At the time he came to you, you did not have any specific  
22 knowledge about the HarbourVest transaction, correct?

23 A I did not have specific knowledge with respect to the  
24 allegations that were laid out and the facts with respect to  
25 the original complaint. I think I had just had a general

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1 awareness that there was a HarbourVest something or other, but  
2 the specific aspects of it, I was unaware.

3 Q Okay. And you had no reason to believe that Mr. Seery had  
4 done anything wrong with respect to the HarbourVest  
5 transaction at the time you became the Plaintiffs' authorized  
6 representative, correct?

7 A That is correct.

8 Q But you recall very specifically that some time after  
9 March 24th Mr. Dondero told you that an investment opportunity  
10 was essentially usurped or taken away, to the Plaintiffs' harm  
11 and for the benefit of HCMLP, correct?

12 A That is correct.

13 Q And after Mr. Dondero brought this information to your  
14 attention, you hired the Sbaiti firm to launch an  
15 investigation into the facts, correct?

16 A Correct.

17 Q You had never worked with the Sbaiti firm before, correct?

18 A That is correct.

19 Q And you had hired many firms as a tax counselor at HCMLP,  
20 but not the Sbaiti firm until now. Correct?

21 A That is correct.

22 Q You got to the Sbaiti firm through a recommendation from  
23 D.C. Sauter, correct?

24 A Correct.

25 Q Mr. Sauter is the in-house counsel, the in-house general

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1 counsel at NexPoint Advisors, correct?

2 A Correct.

3 Q You didn't ask Mr. Sauter for a recommendation for a  
4 lawyer; he just volunteered that you should use the Sbaiti  
5 firm. Correct?

6 A That is correct.

7 Q And you never used -- considered using another firm, did  
8 you?

9 A When they were presented to me, they appeared to have all  
10 the sufficient skills necessary to undertake this action, and  
11 so I don't recall interviewing any other firms.

12 Q Okay. Now, after bringing the matter to your action, Mr.  
13 Dondero communicated directly with the Sbaiti firm in relation  
14 to the investigation that was being undertaken. Correct?

15 A That is correct.

16 Q But you weren't privy to the communications between Mr.  
17 Dondero and the Sbaiti firm, correct?

18 A I did not participate in those conversations as the --  
19 what I, again, considered Mr. Dondero as the investment  
20 advisor to the portfolio, and he was very versant in the  
21 assets. I wanted him to participate in the investigation that  
22 the Sbaiti firm was undertaking prior to the filing of this  
23 complaint.

24 Q Let's talk for a minute about the notion of Mr. Dondero  
25 being the investment advisor. Until recently, the entity

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1 known as the DAF had an investment advisory committee with HC  
2 -- an investment advisory agreement with HCMLP. Correct?

3 A It's my understanding that the investment advisory  
4 agreement existed with the Plaintiffs, CLO Holdco, as well as  
5 Charitable DAF Fund, LP, up and to the end of February,  
6 throughout the HarbourVest transaction.

7 Q Okay. And since February, the Plaintiffs do not have an  
8 investment advisory agreement with anybody, correct?

9 A That is correct.

10 Q Okay. So Mr. Dondero, if he serves as an investment  
11 advisor, it's on an informal basis. Is that fair?

12 A After I took control, he serves as an informal investment  
13 advisor.

14 Q Okay. So there's no contract that you're aware of between  
15 either of the Plaintiffs and Mr. Dondero pursuant to which he  
16 is authorized to act as the investment advisor for the  
17 Plaintiffs, correct?

18 A That is correct.

19 Q Okay. When you communicated with Grant Scott --  
20 withdrawn. You know who Grant Scott is, right?

21 A Yes, I do.

22 Q He's the gentleman who preceded you as the authorized  
23 representative of the Plaintiffs, correct?

24 A Yes.

25 Q Okay. You communicated with Mr. Scott from time to time

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1 during February and March 2021, correct?

2 A February and March are the dates? Yes.

3 Q Yeah. And from February 1st until March 21st -- well,  
4 withdrawn. Prior to March 24th, 2021, Mr. Scott was the  
5 Plaintiffs' authorized representative, correct?

6 A Correct.

7 Q And you have no recollection of discussing with Mr. Scott  
8 at any time prior to March 24th any aspect of the HarbourVest  
9 settlement with Mr. Scott. Correct?

10 A Correct.

11 Q And you have no recollection of discussing whether the  
12 Plaintiffs had potential claims that might be brought against  
13 the Debtor. Correct? Withdrawn. Let me ask a better  
14 question.

15 You have no recollection of discussing with Mr. Scott at  
16 any time prior to March 24th whether the Plaintiffs had  
17 potential claims against the Debtor. Correct?

18 A That is correct.

19 Q You and Mr. Scott never discussed whether either of --  
20 either of the Plaintiffs had potential claims against Mr.  
21 Seery. Correct?

22 A Correct.

23 Q Okay. At the time that you became their authorized  
24 representative, you had no knowledge that the Plaintiffs would  
25 be filing a complaint against the Debtors relating to the

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1 HarbourVest settlement less than three weeks later, correct?

2 A That is correct.

3 Q Okay. Now, if you look at Page 2 of the complaint, you'll  
4 see at the top it refers to Mr. Seery as a potential party.

5 Do you see that?

6 A Yes, I do.

7 Q Okay. You don't know why Mr. Seery was named --  
8 withdrawn. You don't know why Mr. Seery was not named as a  
9 defendant in the complaint, correct?

10 A No, I -- that's correct. I do not know why he was not  
11 named. That's in the purview of the Sbaiti firm.

12 Q Okay. And the Sbaiti firm also made the decision to name  
13 Mr. Seery on Page 2 there as a potential party when drafting  
14 the complaint, correct?

15 A That's what the document says.

16 Q And you weren't involved in the decision to identify Mr.  
17 Seery as a potential party, correct?

18 A That is correct. Again, I rely on the law firm to decide  
19 what parties to bring a suit to -- against.

20 Q Okay. Okay. Do you recall the other day we talked about  
21 a document called the July order?

22 A Yes.

23 Q Okay. That's in -- that's in Tab 16 in your binder, if  
24 you can turn to that. And take a moment to look at it, if  
25 you'd like. And my first question is simply whether this is

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1 the July order, as you understand it.

2 (Pause.)

3 A Yes, it is. I was just looking for the gatekeeper  
4 provision. It looks like it's Paragraph 5. So, --

5 Q Okay. Thank you for that. About a week after the  
6 complaint was filed, you authorized the Plaintiffs to file a  
7 motion in the District Court for leave to amend the  
8 Plaintiffs' complaint to add Mr. Seery as a defendant.

9 Correct?

10 A I authorized the filing of a motion in Federal District  
11 Court that would ask the Federal District Court whether or not  
12 Jim Seery could be named in the original complaint with  
13 respect to the gatekeeper provision cited in that motion and  
14 with respect to the arguments that were made in that motion.

15 Q Okay. Just to be clear, if you turn to Exhibit 17, the  
16 next tab, --

17 A I'm here.

18 Q -- do you see that document is called Plaintiffs' Motion  
19 for Leave to File First Amended Complaint?

20 A Yes.

21 Q And that's the document that you authorized the Plaintiffs  
22 to file on or about April 19th, correct?

23 A Correct.

24 Q Okay. And can we refer to that document as the motion to  
25 amend?

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1 A Yes.

2 Q Okay. You were aware of the July order at Tab 16 before  
3 you authorized the filing of the motion to amend. Correct?

4 A Yes, because it's cited in the motion itself.

5 Q Okay. And at the time that you authorized the filing of  
6 the motion to amend, you understood that the July order was  
7 still in effect. Correct?

8 A Yes, because it was referenced in the motion, so my  
9 assumption would be it would still be in effect.

10 Q Okay. Before the motion to amend was filed, you're -- you  
11 are aware that my firm and the Sbaiti firm communicated by  
12 email about the propriety of filing the motion to amend?

13 A Before it was filed? Communications between your firm and  
14 the Sbaiti firm? I would have to have my recollection  
15 refreshed.

16 Q I'll just ask the question a different way. Did you know  
17 before you authorized the filing of the motion to amend that  
18 my firm and the Sbaiti firm had engaged in an email exchange  
19 about the propriety of filing the motion to amend in the  
20 District Court?

21 A It's my recollection -- and again, I could be wrong here  
22 -- but I thought the email exchange occurred after the fact,  
23 not before. But again, I -- I just --

24 Q Okay. In any event, on April 19th, the motion to amend  
25 was filed. Correct?

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1 A Correct.

2 Q That's the document that is Exhibit 17. And you  
3 personally authorized the Sbaiti firm to file the motion to  
4 amend on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And you authorized the filing of the motion to amend with  
7 knowledge -- withdrawn.

8 Can you read the first sentence of the motion to amend out  
9 loud, please?

10 A Yeah. (reading) Plaintiffs submit this motion under Rule  
11 15 of the Federal Rules of Civil Procedure for one purpose:  
12 to name as defendant one James P. Seery, Jr., the CEO of  
13 defendant Highland Capital Management, LP (HCM) and the chief  
14 perpetrator of the wrongdoing that forms the basis of the  
15 Plaintiffs' causes of action.

16 Q And does that fairly state the purpose of the motion?

17 MR. SBAITI: Objection, Your Honor. Asks him to make  
18 a legal conclusion about the purpose of the legal motion filed  
19 in court that he didn't draft.

20 THE COURT: Okay. I overrule. You can answer if you  
21 have an answer.

22 THE WITNESS: It's always been my general  
23 understanding that the purpose of filing this motion was to go  
24 to the Federal District Court and ask that Court of reference  
25 to this Court whether or not Mr. Seery could be named with

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1 respect to the original complaint, citing again the gatekeeper  
2 provisions and citing the various arguments that we've heard  
3 much earlier.

4 BY MR. MORRIS:

5 Q Okay. You personally didn't learn anything between April  
6 9th, when the complaint was filed, and April 19th, when the  
7 motion to amend was filed, that caused you to authorize the  
8 filing of the motion to amend, correct?

9 A That is correct.

10 Q In fact, you relied on the Sbaiti firm with respect to  
11 decisions concerning the timing of the motion to amend.  
12 Correct?

13 A Correct.

14 Q And you had no knowledge of whether anyone acting on  
15 behalf of the Plaintiffs ever served the Debtor with a copy of  
16 the motion to amend. Correct?

17 A Yes. I have no knowledge.

18 Q Okay. And you have no knowledge that the Sbaiti firm ever  
19 provided my firm with a copy of the motion to amend. Correct?

20 A I cannot recall one way or another.

21 Q Okay. You never instructed anyone on behalf -- acting on  
22 behalf of the Plaintiffs to inform the Debtor that the motion  
23 to amend had been filed, correct?

24 A That is correct.

25 Q And that's because you relied on the Sbaiti firm on

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1 procedural issues, correct?

2 A That is correct.

3 Q You didn't consider waiting until the Debtor --

4 (Interruption.)

5 Q -- had appeared in the action before authorizing the  
6 filing of the motion --

7 A Yeah, --

8 THE COURT: Yes. Y'all are being a little bit loud.

9 Okay.

10 A VOICE: Sorry.

11 MR. MORRIS: No problem.

12 MR. PHILLIPS: I've heard that before, Your Honor,  
13 and I apologize.

14 THE COURT: I bet you have. Thank you.

15 MR. MORRIS: Admonish Mr. Phillips, please.

16 THE COURT: Okay.

17 MR. MORRIS: He's always the wild card.

18 MR. PHILLIPS: I admonish --

19 MR. MORRIS: He's always the wild card.

20 MR. PHILLIPS: I admonish myself.

21 THE COURT: All right. I think he got the message.

22 Continue.

23 BY MR. MORRIS:

24 Q You didn't consider waiting until the Debtor had appeared  
25 in the action before filing the motion to amend, correct?

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1 A Again, I am the client and I rely upon the law firm that's  
2 engaged with respect to making legal decisions as to the  
3 timing and notice and appearance and what have you. I'm a tax  
4 lawyer.

5 Q Okay. You wanted the District Court to grant the relief  
6 that the Plaintiffs were seeking. Correct?

7 A I wanted the District Court to consider, under the  
8 gatekeeper provisions of this Court, whether or not Mr. Seery  
9 could be named in the original complaint. That's -- that,  
10 from my perspective, is what was desired.

11 Q All right. You wanted the District Court to grant the  
12 relief that the Plaintiffs were seeking, correct?

13 MR. SBAITI: Objection, Your Honor. Asked and  
14 answered.

15 THE COURT: Overruled.

16 THE WITNESS: Again, I would characterize this motion  
17 as not necessarily asking for specific relief, but asking the  
18 Federal District Court whether or not, under the gatekeeper  
19 provision, that Mr. Seery could be named on there. What  
20 happens after that would be a second step. So I kind of -- I  
21 dispute that characterization.

22 BY MR. MORRIS:

23 Q All right. I'm going to cross my fingers and hope that  
24 Ms. Carty is on the line, and I would ask her to put up Page  
25 57 from Mr. Patrick's deposition transcript.

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1 THE COURT: There it is.

2 MR. MORRIS: There it is. It's like magic. Can we  
3 go down to Lines 18 through 20?

4 BY MR. MORRIS:

5 Q Mr. Patrick, during the deposition on Friday, did I ask  
6 you this question and did you give me this answer? Question,  
7 "Did you want the Court to grant the relief you were seeking?"  
8 Answer, "Yes."

9 A I -- and it was qualified with respect to Lines 12 through  
10 17. In my view, when I answered yes, I was simply restating  
11 what I stated in Line 12. I wanted the District Court to  
12 consider this motion as to whether or not Mr. Seery could be  
13 named in the original complaint or the amended complaint  
14 pursuant to the existing gatekeeper rules and the arguments  
15 that were made in that motion. That's -- that's what I  
16 wanted. And so then when I was asked, did you want the Court  
17 to grant the relief that you were seeking, when I answered  
18 yes, it was from that perspective.

19 Q Okay. Thank you very much. If the District Court had  
20 granted the relief that you were seeking, you would have  
21 authorized the Sbaiti firm to file the amended complaint  
22 naming Mr. Seery as a defendant if the Sbaiti firm recommended  
23 that you do so. Correct?

24 A If the Sbaiti firm recommended that I do so. That is  
25 correct.

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1 Q Okay. Let's talk for a little bit about the line of  
2 succession for the DAF and CLO Holdco. Can we please go to  
3 Exhibit 25, which is in the other binder? It's in the other  
4 binder, sir.

5 (Pause.)

6 Q I guess you could look on the screen or you can look in  
7 the binder, whatever's easier for you.

8 A Yeah. I prefer the screen. I prefer the screen.

9 Q Okay.

10 A It's much easier.

11 Q All right. We've got it in both spots. But do you have  
12 Exhibit 25 in front of you, sir?

13 A Yes, I do.

14 Q All right. Do you know what it is?

15 A This is the organizational chart depicting a variety of  
16 charitable entities as well as entities that are commonly  
17 referred to the DAF. However, when I look at this chart, I do  
18 not look at and see just boxes, what I see is the humanitarian  
19 effort that these boxes represent.

20 MR. MORRIS: Your Honor, may I interrupt?

21 THE COURT: You may.

22 MR. MORRIS: Okay.

23 BY MR. MORRIS:

24 Q I appreciate that, and when your lawyers get up to ask you  
25 questions, I bet they'll want to know just what you were about

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1 to tell me. But I just want to understand what this chart is.

2 This chart is the DAF, CLO Holdco, structure chart. Correct?

3 A Correct.

4 Q Okay. And you were personally involved in creating this  
5 organizational structure, correct?

6 A I -- yes.

7 Q Okay. And from time to time, the Charitable DAF Holdco  
8 Limited distributes cash to the foundations that are above it.  
9 Correct?

10 A Correct.

11 Q All right. I want to talk a little bit more specifically  
12 about how this happens. The source of the cash distributed by  
13 Charitable DAF Holdco Limited is CLO Holdco, Ltd., that  
14 entity, the Cayman Islands entity near the bottom. Correct?

15 MR. ANDERSON: Your Honor, I have an objection.  
16 Completely irrelevant. I'm objecting on relevance grounds.  
17 This has nothing to do with the contempt proceeding. We've  
18 already gone over that he authorized the filing of the  
19 complaint, that he authorized the filing of the motion to  
20 amend. It's all in the record. This is completely irrelevant  
21 at this point.

22 THE COURT: Okay. Relevance objection. Your  
23 response?

24 MR. MORRIS: I believe that it's relevant to the  
25 Debtor's motion to hold Mr. Dondero in contempt for pursuing

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1 claims against Mr. Seery, in violation of the July 7 order. I  
2 think an understanding of what the Plaintiffs are, how they're  
3 funded, and Mr. Dondero's interest in pursuing claims on  
4 behalf of those entities is relevant to the -- to the -- just  
5 -- it's just against him. It's not against their clients,  
6 frankly. It's just against Mr. Dondero.

7 THE COURT: I overrule.

8 MR. MORRIS: I'll try and -- I'll try and make this  
9 quick, though.

10 BY MR. MORRIS:

11 Q CLO Holdco had two primary sources of capital. Is that  
12 right?

13 A Two primary sources of capital?

14 Q Let me ask it differently. There was a Charitable  
15 Remainder Trust that was going to expire in 2011, correct?

16 A That is correct.

17 Q And that Charitable Remainder Trust had certain CLO equity  
18 assets, correct?

19 A Correct.

20 Q And the donor to that Charitable Remainder Trust was  
21 Highland Capital Management, LP. Correct?

22 A Not correct. After my deposition, I refreshed my memory.  
23 There were two Charitable Remainder Trusts that existed, which  
24 I think in my mind caused a little bit of confusion. The  
25 Charitable Remainder Trust No. 2, which is the one that

Patrick - Direct

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1 expired in 2011, was originally funded by Mr. Dondero.

2 Q Okay. So, so the Charitable Remainder Trust that we were  
3 talking about on Friday wasn't seeded with capital from  
4 Highland Capital Management, it came from Mr. Dondero  
5 personally?

6 A That is correct.

7 Q Okay. Thank you. And the other primary source of capital  
8 was the Dallas Foundation, the entity that's in the upper  
9 left-hand corner of the chart. Is that correct?

10 A No.

11 Q The -- you didn't tell me that the other day?

12 A You said -- you're pointing to the Dallas Foundation.  
13 That's a 501(c)(3) organization.

14 Q I apologize. Did you tell me the other day that the  
15 Dallas Foundation was the second source of capital for HCLO  
16 Hold Company?

17 A No, I did not. You --

18 (Pause.)

19 Q Maybe I know the source of the confusion. Is the Highland  
20 Dallas Foundation something different?

21 A Yes. On this organizational chart, you'll see that it has  
22 an indication, it's a supporting organization.

23 Q Ah, okay. So, so let me restate the question, then. The  
24 second primary source of capital for CLO Holdco, Ltd. is the  
25 Highland Dallas Foundation. Do I have that right?

Patrick - Direct

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1 A Yes.

2 Q Okay. And the sources of that entity's capital were  
3 grantor trusts and possibly Mr. Dondero personally. Correct?

4 A In addition -- per my refreshing my recollection from our  
5 deposition, the other Charitable Remainder Trust, I believe  
6 Charitable Remainder Trust No. 1, which expired later, also  
7 sent a donation, if you will, or assets to -- and I cannot  
8 recall specifically whether it was just the Highland Dallas  
9 Foundation or the other supporting organizations that you see  
10 on this chart.

11 Q But the source of that -- the source of the assets that  
12 became the second Charitable Remainder Trust was Highland  
13 Capital Management, LP. Is that right?

14 A I think that is accurate from my recollection. And again,  
15 I'm talking about Charitable Remainder Trust No. 1.

16 Q Okay. So is it fair to say -- I'm just going to try and  
17 summarize, if I can. Is it fair to say that CLO Holdco, Ltd.  
18 is the investment arm of the organizational structure on this  
19 page?

20 A Yes.

21 Q And is it fair to say that nearly all of the assets that  
22 are in there derived from either Mr. Dondero, one of his  
23 trusts, or Highland Capital Management, LP?

24 A Yes. It's like the Bill Gates Foundation or the  
25 Rockefeller Foundation. These come from the folks that make

Patrick - Direct

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1 their donations and put their name on it.

2 Q Okay.

3 MR. MORRIS: Now, now, Your Honor, I'm going to go  
4 back just for a few minutes to how Mr. Scott got appointed,  
5 because I think that lays kind of the groundwork for his  
6 replacement. It won't take long.

7 THE COURT: Okay. I have a question either --

8 MR. MORRIS: Sure.

9 THE COURT: -- for you or the witness. I'm sorry,  
10 but --

11 MR. MORRIS: Sure. Yeah.

12 THE COURT: -- the organizational chart, it's not  
13 meant to show everything that might be connected to this  
14 substructure, right? Because doesn't CLO Holdco, Ltd. own  
15 49.02 percent of HCLOF, --

16 MR. MORRIS: That --

17 THE COURT: -- which gets us into the whole  
18 HarbourVest transaction issue?

19 MR. MORRIS: You're exactly right, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: But that's just an investment that HCLO  
22 Holdco made.

23 THE COURT: Right.

24 MR. MORRIS: Right? And so I -- let me ask the  
25 witness, actually.

Patrick - Direct

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1 THE COURT: Okay. Thank you. Thank you.

2 MR. MORRIS: Let me ask the witness. Yeah.

3 THE COURT: I just want my brain --

4 MR. MORRIS: Right.

5 THE COURT: -- to be complete on this chart.

6 BY MR. MORRIS:

7 Q Mr. Patrick, there are three entities under CLO Holdco,  
8 Ltd. Do you see that?

9 A Yes.

10 Q And does CLO Holdco, Ltd. own one hundred percent of the  
11 interests in each of those three entities?

12 A Yes.

13 Q Do you know why those three entities are depicted on this  
14 particular chart? Is it because they're wholly-owned  
15 subsidiaries?

16 A Correct.

17 Q Okay. And CLO Holdco, Ltd. has interests in other  
18 companies. Isn't that right?

19 A It has other investments. That is correct.

20 Q And the reason that they're not depicted on here is  
21 because they're not wholly-owned subsidiaries, they're just  
22 investments; is that fair?

23 A That is fair.

24 MR. MORRIS: Does that--?

25 THE COURT: Yes.

Patrick - Direct

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1 MR. MORRIS: Okay.

2 THE COURT: Uh-huh.

3 BY MR. MORRIS:

4 Q So, so let's go back to Mr. Grant for a moment. Mr.  
5 Scott, rather. Mr. Dondero was actually the original general  
6 partner. If you look at this chart, while it's still up here,  
7 you see on the left there's Charitable DAF GP, LLC?

8 A Yes.

9 Q And the Charitable DAF GP, LLC is the general partner of  
10 the Charitable DAF Fund, LP. Correct?

11 A Correct.

12 Q And on this chart, Grant Scott was the managing member of  
13 Charitable DAF GP, LLC. Right?

14 A Correct.

15 Q Okay. But Mr. Dondero was the original general partner of  
16 that entity, correct?

17 A That is correct. But I do want to point out, I just note  
18 that the GP interest is indicating a one percent interest and  
19 the 99 interest to Charitable DAF Holdco. I believe that's  
20 incorrect. It's a hundred percent by Charitable DAF Holdco,  
21 Ltd., and the Charitable DAF GP interest is a noneconomic  
22 interest. So that should actually reflect a zero percent to  
23 the extent it may indicate some sort of profits or otherwise.

24 Q Okay. Thank you for the clarification. Can you turn to  
25 Exhibit 26, please, in your binder? And is it your

Patrick - Direct

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1 understanding that that is the amended and restated LLC  
2 agreement for the DAF GP, LLC?

3 A Yes.

4 Q Okay. And this was amended and restated effective as of  
5 January 1st, 2012, correct?

6 A Yes.

7 Q And if you go to the last page, you'll see there are  
8 signatures for Mr. Scott and Mr. Dondero, correct?

9 A Yes.

10 Q And Mr. Dondero is identified as the forming -- former  
11 managing member and Mr. Scott is identified as the new  
12 managing member. Correct?

13 A Correct. That's what the document says.

14 Q And it's your understanding that Mr. Dondero had the  
15 authority to select his successor. Correct?

16 A Correct.

17 Q In fact, it's based on your understanding of documents and  
18 your recollection that Mr. Dondero personally selected Mr.  
19 Scott as the person he was going to transfer control to,  
20 correct?

21 A Upon advice of Highland Capital Management's tax  
22 compliance officer, Mr. Tom Surgent.

23 Q What advice did Mr. Surgent give?

24 A He gave advice that, because Mr. Dondero -- and this is  
25 what I came to an understanding after the fact of this

Patrick - Direct

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1 transaction, because I was not a part of it -- that by Mr.  
2 Dondero holding that GP interest, that it would be -- the  
3 Plaintiffs, if you will, would be an affiliate entity for  
4 regulatory purposes, and so he advised that if he -- if Mr.  
5 Dondero transferred his GP interest to Mr. Scott, it would no  
6 longer be an affiliate, is my recollection.

7 Q Okay. You didn't appoint Mr. Scott, did you?

8 A No.

9 Q That was Mr. Dondero. Is that right?

10 A Yes.

11 Q Okay. Let's go to 2021. Let's come back to the current  
12 time. Sometime in February, Mr. Scott called you to ask about  
13 the mechanics of how he could resign. Correct?

14 A That is correct.

15 Q But the decision to have you replace Mr. Scott was not  
16 made until March 24th, the day you sent an email to Mr. Scott  
17 with the transfer documents. Correct?

18 A That is correct.

19 Q And it's your understanding that he could have transferred  
20 the management shares and control of the DAF to anyone in the  
21 world. Correct?

22 A Correct.

23 Q That's what the docu... that he had the authority under  
24 the documentation, as you understood it, to freely trade or  
25 transfer the management shares. Correct?

Patrick - Direct

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1 A Wait. Now, let's be precise here.

2 Q Okay.

3 A Are you talking about the GP interests or the management  
4 shares held by Charitable DAF Holdco, Ltd.?

5 Q Let's start with the management shares. Can you explain  
6 to the Court what the management shares are?

7 MR. ANDERSON: Your Honor? Hang on one second. Your  
8 Honor, I want to object again on relevance. We're going way  
9 beyond the scope of the contempt issue, whether or not --

10 MR. MORRIS: This is about control.

11 MR. ANDERSON: -- the motion to amend somehow  
12 violated the prior order of this Court. Getting into the  
13 management structure, transfer of shares, that's way outside  
14 the bounds. I object on relevance.

15 THE COURT: Okay. Relevance objection?

16 MR. MORRIS: Your Honor, they have probably 30  
17 documents, maybe 20 documents, on their exhibit list that  
18 relate to management and control. I'm asking questions about  
19 management and control. Okay? This is important, again, to  
20 (a) establish his authority, but (b) the circumstances under  
21 which he came to be the purported control person.

22 THE COURT: Okay. Overruled. Go ahead.

23 THE WITNESS: It might be helpful to look at the  
24 organizational chart, but if not -- but I'll describe it to  
25 you again. With respect to the entity called --

Patrick - Direct

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1                   MR. MORRIS: Hold on one second. Can we put up the  
2 organizational chart again, Ms. Carty, if you can? There you  
3 go.

4                   THE WITNESS: Okay. So with respect to the  
5 Charitable DAF Holdco, Ltd., it is my understanding that Mr.  
6 Scott, he organized that entity when he was the independent  
7 director of the Charitable Remainder Trust, and he caused the  
8 issuance of the management shares to be issued to himself.  
9 And then those are, again, noneconomic shares, but they are  
10 control shares over that entity.

11                  And I think, to answer your question, is -- it -- he alone  
12 decides who he can transfer those shares to.

13 BY MR. MORRIS:

14 Q                Do I have this right, that whoever holds the noneconomic  
15 management shares has the sole authority to appoint the  
16 representatives for each of the Charitable DAF entities and  
17 CLO Holdco? It's kind of a magic ticket, if you will?

18 A                It -- I think there's a -- the answer really is no from a  
19 legal standpoint, because Charitable DAF Holdco is a limited  
20 partner in Charitable DAF Fund, LP, so it does not have  
21 authority -- authority under all -- the respective entities  
22 underneath that. It could cause a redemption, if you will, of  
23 Charitable DAF Fund. And so, really, the authority -- the  
24 trickle-down authority that you're referencing is with respect  
25 to his holding of the Charitable DAF GP, LLC interest. It's a

Patrick - Direct

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1 member-managed Delaware limited liability company. And from  
2 that, he -- that authority kind of trickles down to where he  
3 can appoint directorships.

4 Q All right. I think I want to just follow up on that a  
5 bit. Which entity is the issuer of the manager shares, the  
6 management shares?

7 A Yeah, the -- per the organizational chart, it is accurate,  
8 it's the Charitable DAF Holdco, Ltd. which issued the  
9 management shares to Mr. Scott.

10 Q Okay. And that's why you have the arrow from Mr. Scott  
11 into that entity?

12 A Correct.

13 Q And do those -- does the holder of the management shares  
14 have the authority to control the Charitable DAF Holdco, Ltd.?

15 A Yes.

16 Q Okay. And as the control person for the Charitable DAF  
17 Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF  
18 Holdco Limited owns a hundred percent of the limited  
19 partnership interests of the Charitable DAF Fund, LP.

20 Correct?

21 A Correct.

22 Q And so does the holder of that hundred percent limited  
23 partnership interest have the authority to decide who acts on  
24 behalf of the Charitable DAF Fund, LP?

25 A I would say no. I mean, you know, just -- I would love to

Patrick - Direct

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1 read the partnership agreement again. But I, conceptually,  
2 what I know with partnerships, I would say the limited partner  
3 would not. It would be through the Charitable DAF GP, LLC  
4 interest.

5 Q The one on the left, the general partner?

6 A The general partner.

7 Q I see. So when Mr. Scott transferred to you the one  
8 hundred percent of the management shares as well as the title  
9 of the managing member of the Charitable DAF GP, LLC, did  
10 those two events give you the authority to control the  
11 entities below it?

12 A Yes.

13 Q Thank you. And so prior to the time that he transferred  
14 those interests to you, is it your understanding that Mr.  
15 Scott had the unilateral right to transfer those interests to  
16 anybody in the world?

17 A Yes.

18 Q Okay. And you have that right today, don't you?

19 A Yes, I do.

20 Q If you wanted, you could transfer it to me, right?

21 A Yes, I could.

22 Q Okay. But of all the people in the world, Mr. Scott  
23 decided to transfer the management shares and the managing  
24 member title of the DAF GP to you, correct?

25 A Restate that question again?

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF  
TEXAS, DALLAS DIVISION**

**In Re: Highland Capital Management, LP** § Case No. 19-34054-SGJ-11

# The Charitable DAF Fund, L.P. et al

Appellant §

VS. §

**Highland Capital Management, L.P** § **3:21-CV-01974-X**

## Appellee §

[2660] Memorandum Opinion And Order Holding Certain Parties And Their Attorneys In Civil Contempt of Court For Violation Of Bankruptcy Court Orders (RE: related document(s)[2247](#) Motion for order to show cause filed by Debtor Highland Capital Management, L.P.). Entered on 8/4/2021

## APPELLEE RECORD

VOLUME 46

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re: ) Chapter 11  
HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>1</sup> ) Case No. 19-34054-sgj11  
Reorganized Debtor. )  
)

**APPELLEE'S SUPPLEMENTAL RESIGNATION OF RECORD ON APPEAL**

Highland Capital Management, L.P. (“Appellee” or the “Reorganized Debtor”), pursuant to Rule 8009(a)(2) of the Federal Rules of Bankruptcy Procedure, hereby submits its supplemental designation of items to be included in the record in the appeal filed by The Charitable DAF Fund,

<sup>1</sup> The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

L.P., CLO Holdco, Ltd., Mark Patrick, Sbaiti & Company PLLC, Mazin A. Sbaiti, and Jonathan Bridges (collectively, “Appellants”) from the *Memorandum Opinion and Order Holding Certain Parties and Their Attorneys in Civil Contempt of Court for Violation of Bankruptcy Court Orders* [Docket No. 2660] entered by the United States Bankruptcy Court for the Northern District of Texas on August 4, 2021 in the above-styled bankruptcy case (the “Bankruptcy Case”). Appellee respectfully reserves the right to supplement and/or amend the record on appeal designated herein.

#### I. Supplemental Items from the Docket in the Bankruptcy Case

Appellee designates the following additional items from the docket in the Bankruptcy Case, in addition to the items previously designated by the Appellants:

*Vol. 48*

<u>Date</u>	<u>Docket No.</u>	<u>Description</u>
6/4/2021	2407	Amended Notice of Hearing on 1) Order Requiring the Violators to Show Cause Why They Should Not be Held in Civil Contempt for Violating Two Court Orders; 2) Debtor’s Motion for Entry of an Order Further Extending the Period Within Which it May Remove Actions Pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure; and 3) the Notice of Motion for Modification of Order Authorizing Retention of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction; to be Held on June 8, 2021 at 9:30 a.m. (Central Time) (Filed by Debtor Highland Capital Management, L.P.)
6/7/2021	2421	Debtor’s Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on June 8, 2021 (Filed by Debtor Highland Capital Management, L.P.)
6/10/21	2440	Transcript Regarding Hearing Held June 8, 2021 re: 1) Show Cause Hearing; 2) Motion to Modify Order; and 3) Motion to Extend Time (Transcript Release Date is September 8, 2021)

*009736*

*009742*

*009805*

*thru Vol. 46*

Appellee reserves the right to designate additional items depending on the arguments made by Appellants on appeal.

Dated: September 13, 2021.

**PACHULSKI STANG ZIEHL & JONES LLP**

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Patrick - Direct

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1 Q Of all the people in the world, Mr. Scott decided to  
2 transfer it to you, correct?

3 A Yeah. Mr. Scott transferred those interests to me.

4 Q Okay. And you accepted them, right?

5 A Yes.

6 Q You're not getting paid anything for taking on this  
7 responsibility, correct?

8 A I am not paid by any of the entities depicted on this  
9 chart.

10 Q And Mr. Scott used to get \$5,000 a month, didn't he?

11 A I believe that's what he testified to.

12 Q Yeah. But you don't get anything, right?

13 A Correct.

14 Q In fact, you get the exact same salary and compensation  
15 from Skyview that you had before you became the authorized  
16 representative of the DAF entities and CLO Holdco. Correct?

17 A Correct.

18 MR. MORRIS: Okay. Your Honor, if I may just take a  
19 moment, I may be done.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, I have no further questions.

23 THE COURT: All right. Pass the witness. Any  
24 examination of the witness?

25 CROSS-EXAMINATION

Patrick - Cross

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1 BY MR. ANDERSON:

2 Q Mr. Patrick, I just had a few follow-up questions. When  
3 you authorized the filing of the lawsuit against Highland  
4 Capital Management, LP, Highland HCF Advisor Limited, and  
5 Highland CLO Funding, Limited, when that lawsuit was filed in  
6 April of this year, was Mr. Seery included as a defendant?

7 A No.

8 Q Have the two Plaintiffs in that lawsuit, have they  
9 commenced any lawsuit against Mr. Seery?

10 A No.

11 Q Have they pursued any lawsuit against Mr. Seery?

12 A No.

13 Q Have they pursued a claim or cause of action against Mr.  
14 Seery?

15 A No.

16 Q At most, did the Plaintiffs file a motion for leave to add  
17 Mr. Seery as a defendant?

18 MR. MORRIS: Objection, Your Honor. To the extent  
19 that any of these questions are legal conclusions, I object.  
20 He's using the word pursue. If he's trying -- if he's then  
21 going to argue that, But the witness testified that he didn't  
22 pursue and that's somehow a finding of fact, I object.

23 THE COURT: Okay. I understand.

24 MR. MORRIS: Yeah.

25 THE COURT: But I overrule. He can answer.

Patrick - Cross

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1 MR. MORRIS: That's fine.

2 THE WITNESS: Can you restate the question again?

3 BY MR. ANDERSON:

4 Q Sure. On behalf of the Plaintiffs -- well, strike that.

5 Did the Plaintiffs pursue a claim or cause of action against  
6 Mr. Seery?

7 A No.

8 Q At most, did the Plaintiffs file a motion for leave to  
9 file an amended complaint regarding Mr. Seery?

10 A Yes. But, again, I viewed the motion as simply asking the  
11 Federal District Court whether Mr. Seery could or could not be  
12 named in a complaint, and then the next step might be how the  
13 Federal District Court might rule with respect to that.

14 Q And we have -- it's Tab 17 in the binders in front of you.  
15 That is Plaintiffs' motion for leave. If you could turn to  
16 that, please.

17 A Yes. I've got it open.

18 Q Is the Court's July order, the Bankruptcy Court's July  
19 order, is it mentioned on the first page and then throughout  
20 the motion for leave to amend?

21 A Yes, it is. I see it quoted verbatim on Page 2 under  
22 Background.

23 Q Was the Court's order hidden at all from the District  
24 Court?

25 A The document speaks for itself. It's very transparent.

Patrick - Cross

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1 Q Was there any effort whatsoever to hide the prior order of  
2 the Bankruptcy Court?

3 A No.

4 MR. ANDERSON: Pass the witness.

5 THE COURT: Okay. Other examination?

6 MR. SBAITI: Yes, Your Honor. Just a couple of  
7 questions.

8 CROSS-EXAMINATION

9 BY MR. SBAITI:

10 Q Do you mind flipping to Exhibit 25, which I believe is the  
11 org chart, the one that you were looking at before?

12 A Okay.

13 Q It'll still be in --

14 A Okay. Yeah.

15 Q -- the defense binder. No reason to swap out right now.

16 A I've got the right binders. Some of them are repeatable  
17 exhibits, so --

18 Q Yeah.

19 A -- I have to grab the right binder. Yes.

20 Q As this org chart would sit today, is the only difference  
21 that Grant Scott's name would instead be Mark Patrick?

22 A Yes.

23 Q Was there ever a period of time where Jim Dondero's name  
24 would sit instead of Grant Scott's name prior?

25 A Yes, originally, when this -- yes.

Patrick - Cross

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1 Q So did Mr. Dondero both have the control shares of the GP,  
2 LLC and DAF Holdco Limited?

3 A No, I believe not. I believe he only held the Charitable  
4 DAF GP interest and that Mr. Scott at all times held the  
5 Charitable DAF Holdco, LTD interest, until he decided to  
6 transfer it to me.

7 Q Can you just tell us how Mr. Scott came to hold the  
8 control shares of the Charitable DAF Holdco, LTD?

9 A When he was the independent trustee of the Charitable  
10 Remainder Trust, he caused that -- the creation of that  
11 entity, and that's how he became in receipt of those  
12 management shares.

13 Q And does the Charitable DAF GP, LLC have any control over  
14 Charitable DAF Fund, LP's actions or activities?

15 A Yes, it does.

16 Q What kind of control is that?

17 A I would describe complete control. It's the managing  
18 member of that entity and can -- and effectively owns, you  
19 know, the hundred percent interest in the respective  
20 subsidiaries, and so the control follows down.

21 Q And when did Mr. Scott replace Mr. Dondero as the GP --  
22 managing member of the GP?

23 A Well, I think as the -- and Mr. Morris had shown me with  
24 respect to that transfer occurring on March 2012.

25 Q So nine years ago?

Patrick - Cross

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1 A Yes.

2 Q Does Mr. Dondero today exercise any control over the  
3 activities of the DAF Charitable -- the Charitable DAF, GP or  
4 the Charitable DAF Holdco, LTD?

5 A No.

6 Q Is he a board member of sorts for either of those  
7 entities?

8 A No.

9 Q Is he a board members of CLO Holdco?

10 A No.

11 Q Does he have any decision-making authority at CLO Holdco?

12 A None.

13 Q The decision to authorize the lawsuit and the decision to  
14 authorize the motion that you've been asked about, who made  
15 that authorization?

16 A I did.

17 Q Did you have to ask for anyone's permission?

18 A No.

19 MR. SBAITI: No more questions, Your Honor.

20 THE COURT: Okay. Any -- I guess Mr. Taylor, no.

21 All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Since becoming the authorized representative of the  
25 Plaintiffs, have you ever made a decision on behalf of those

Patrick - Cross

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1 entities that Mr. Dondero disagreed with?

2 A I have made decisions that were adverse to Mr. Dondero's  
3 financial -- financial decision. I mean, financial interests.  
4 Whether he disagreed with them or not, I don't -- he has not  
5 communicated them to me. But they have been adverse, at least  
6 two very strong instances.

7 Q Have you ever -- have you ever talked to him about making  
8 a decision that would be adverse to his interests? Did he  
9 tell -- did --

10 A I didn't -- I don't -- I did not discuss with him prior to  
11 making the decisions that I made that were adverse to his  
12 economic interests.

13 MR. MORRIS: Okay. No further questions, Your Honor.

14 THE COURT: Any further examination? Recross on that  
15 redirect?

16 MR. ANDERSON: No further questions.

17 MR. SBAITI: No further questions, Your Honor.

18 MR. ANDERSON: Sorry.

19 THE COURT: Nothing?

20 MR. ANDERSON: I think we're good.

21 THE COURT: Okay. I have one question, Mr. Patrick.  
22 My brain sometimes goes in weird directions.

23 EXAMINATION BY THE COURT

24 THE COURT: I'm just curious. What are these Cayman  
25 Island entities, charitable organizations formed in the Cayman

Patrick - Examination by the Court

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1 Islands?

2 THE WITNESS: Yeah. I'll keep it as simple as I can,  
3 even though I'm a tax lawyer, so I won't get into the tax  
4 rules, but the Cayman structure is modeled after what you  
5 typically see in the investment management industry, and so I  
6 -- and I won't reference specific entities here with respect  
7 to the Highland case, but I think you'll note some  
8 similarities, if you think about it. They're -- it's  
9 described as an offshore master fund structure where you have  
10 a -- and that would be the Charitable DAF Fund that's  
11 organized offshore, usually in the Cayman or Bermuda Islands,  
12 where the general partner, typically, in the industry, holds  
13 the management --

14 THE COURT: Yeah. Let --

15 THE WITNESS: Okay.

16 THE COURT: -- me just stop you. I've seen this  
17 enough --

18 THE WITNESS: Yeah, it's

19 THE COURT: -- to know that it happens in the  
20 investment world. But in --

21 THE WITNESS: Yeah.

22 THE COURT: You know, usually, I see 501(c)(3), you  
23 know, domestically-created entities for charitable purposes,  
24 so I'm just curious.

25 THE WITNESS: Yes.

Patrick - Examination by the Court

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1 THE COURT: Uh-huh.

2 THE WITNESS: The offshore master fund structure  
3 typically will have two different types of -- they call it  
4 foreign feeder funds. One foreign feeder fund is meant to  
5 accommodate foreign investors; the other foreign feeder fund  
6 is meant to accommodate U.S. tax-exempt investors.

7 Why, why is it structured that way? In order to avoid  
8 something called -- I was trying not to be wonkish -- UBTI.  
9 That's, let's see, Un -- Unrelated Trader Business Income. I  
10 probably have that slightly wrong. But it's essentially,  
11 it's a means to avoid active business income, which includes  
12 debt finance income, which is what these CLOs tend to be, that  
13 would throw off income that would be taxable normally if the  
14 exemptions did not go through this foreign blocker, and it  
15 converts that UBTI income -- it's called (inaudible) income --  
16 into passive income that flows -- that flows up to the  
17 charities.

18 And so it's very typical that you'll have a U.S. tax-  
19 exempt investor, when they make an investment in a fund,  
20 prefer to go through an offshore feeder fund, which is  
21 actually Charitable DAF Holdco, LTD. That's essentially what,  
22 from a tax perspective, represents as a UBTI blocker entity.  
23 And then you have the offshore investments being held offshore  
24 because there's a variety of safe harbors where the receipt of  
25 interest, the portfolio interest exception, is not taxable.

Patrick - Examination by the Court

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1 The creation of capital gains or losses under the -- they call  
2 it the trading, 864(b) trading safe harbor, is not taxable.  
3 So that's why you'll find these structures operating offshore  
4 to rely on those safe harbor provisions as well as -- as well  
5 as what I indicated with respect to the two type blocker  
6 entities. It's very typical and industry practice to organize  
7 these way. And so when this was set --

8 THE COURT: It's very typical in the charitable world  
9 to --

10 THE WITNESS: In the investment management --

11 THE COURT: -- form this way?

12 THE WITNESS: In the investment management world,  
13 when you have charitable entities that are taking some  
14 exposure to assets that are levered, to set this structure up  
15 in this way. It was modeled after -- they just call them  
16 offshore master fund structures. They're known as Mickey  
17 Mouse structures, where you'll have U.S. investors --

18 THE COURT: Yes. I -- yes, I --

19 THE WITNESS: -- enter through a U.S. partnership,  
20 and the foreign investors enter through a blocker.

21 THE COURT: It was really just the charitable aspect  
22 of this that I was --

23 THE WITNESS: Yeah. Yeah.

24 THE COURT: -- getting at.

25 THE WITNESS: Yeah. No, but I'm just trying to

Patrick - Recross

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1 emphasize if --

2 THE COURT: All right. It's --

3 THE WITNESS: Yeah.

4 THE COURT: -- neither here nor there. All right.

5 MR. SBAITI: Your Honor, may I ask a slightly  
6 clarifying leading question on that, because I think I  
7 understand what he was trying to say, just for the record?

8 THE COURT: Well, --

9 MR. MORRIS: I object.

10 THE COURT: -- I tell you what. Anyone who wants to  
11 ask one follow-up question on the judge's question can do so.  
12 Okay? You can go first.

13 MR. SBAITI: I'll approach, Your Honor.

14 THE COURT: Okay.

15 RECROSS-EXAMINATION

16 BY MR. SBAITI:

17 Q Would it be a fair summary of what you were saying a  
18 minute ago that the reason the bottom end of that structure is  
19 offshore is so that it doesn't get taxed before the money  
20 reaches the charities on the U.S. side?

21 A Tax -- it converts the nature of the income that is being  
22 thrown off by the investments so that it becomes a tax  
23 friendly income to the tax-exempt entity. Passive income.  
24 That's --

25 Q So, essentially, --

Patrick - Recross

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1 THE COURT: Okay. Okay.

2 MR. SBAITI: -- so it doesn't get taxed before it  
3 hits the --

4 THE COURT: I said one question.

5 MR. SBAITI: Sorry, Your Honor.

6 THE COURT: Okay. He answered it.

7 MR. PHILLIPS: And I have one question, Your Honor

8 THE COURT: Okay.

9 MR. PHILLIPS: I don't know if I need to ask this  
10 question, but I'd rather not ask you if I need to ask it.

11 THE COURT: Go ahead.

12 MR. PHILLIPS: But if I do, you know, I could --

13 THE COURT: Go ahead.

14 MR. PHILLIPS: Well, okay.

15 RECROSS-EXAMINATION

16 BY MR. PHILLIPS:

17 Q We've talked about the offshore structure. Are the  
18 foundations in the top two tiers of the organizational chart  
19 offshore entities?

20 A No.

21 Q They're --

22 A They're onshore entities. They're tax-exempt entities.

23 Q Thank you.

24 A The investments are offshore.

25 Q Thank you.

Patrick - Further Redirect

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1 THE COURT: Mr. Morris? One question.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. MORRIS:

4 Q Do you hold yourself out as an expert on the  
5 organizational structures in the Caribbean for charitable  
6 organizations?

7 A I hold myself out as a tax professional versant on setting  
8 up offshore master fund structures. It's sort of a bread-and-  
9 butter thing. But there are plenty of people that can testify  
10 that this is very typical.

11 Q Uh-huh. Okay.

12 THE COURT: Okay. Thank you.

13 All right. You are excused, Mr. Patrick. I suppose  
14 you'll want to stay around. I don't know if you'll  
15 potentially be recalled today.

16 (The witness steps down.)

17 THE COURT: All right. We should take a lunch break.  
18 I'm going to put this out for a democratic vote. Forty-five  
19 minutes? Is that good with everyone?

20 MR. SBAITI: Do we have to leave the building to eat,  
21 Your Honor, or is there food in the building?

22 THE COURT: I think --

23 MR. SBAITI: I'm sorry to ask that question, but --

24 THE COURT: Yes. You know what, there used to be a  
25 very bad cafeteria, but I think it closed. Right, Mike? So,

1 you know, --

2 MR. SBAITI: Sorry I asked that.

3 A VOICE: Hate to miss that one.

4 THE COURT: Is 45 minutes not enough since you have  
5 to go off campus? I'll give you an hour. It just means we  
6 stay later tonight.

7 A VOICE: Can we just say 2:00 o'clock?

8 MR. SBAITI: That's fine with us, Your Honor.

9 THE COURT: 2:00 o'clock. That's 50 minutes. See  
10 you then.

11 MR. SBAITI: Thank you.

12 A VOICE: Your Honor, can we just get a time check?

13 THE COURT: Okay.

14 THE CLERK: Yeah. The Debtors are at an hour and  
15 eleven minutes. Respondents at an hour nineteen.

16 THE COURT: And hour and eleven and an hour and  
17 nineteen.

18 A VOICE: Wait, that's not right.

19 A VOICE: That can't be right.

20 A VOICE: Two hours? We started at --

21 THE COURT: Okay. So, again, their side, the  
22 collective Respondents?

23 THE CLERK: An hour and eleven, responding to your  
24 questions, --

25 A VOICE: Yeah, he's not recording --

1                   THE CLERK: So an hour and eleven and an hour and  
2 nineteen.

3                   THE COURT: But they were already over an hour --

4                   A VOICE: Yeah. It's been over three hours.

5                   THE COURT: -- with opening statements.

6                   THE CLERK: An hour and twelve. Yes. They were very  
7 short with the questioning. It was only like --

8                   THE COURT: Okay. We'll double-check that over the  
9 break with the court reporter.

10                  A VOICE: All right. Thank you, Your Honor.

11                  THE COURT: We'll double-check and let you know.

12                  THE COURT: All rise.

13                  (A luncheon recess ensued from 1:09 p.m. until 2:03 p.m.)

14                  THE COURT: All right. Please be seated. We're  
15 going back on the record in Highland after our lunch break.  
16 I'm going to confirm time. We've had the Debtor an aggregate  
17 of an hour and eleven minutes. The Respondents, an aggregate  
18 of an hour and twenty minutes. Okay? So we've gone two hours  
19 and thirty-one minutes.

20                  If it seems like we've been going longer, it's because we  
21 did not do the clock on the opening matters regarding removal,  
22 extension of time. And then when I interjected with  
23 questions, we stopped the clock. All right? So let's go.

24                  You may call your next witness, Mr. Morris.

25                  MR. MORRIS: Thank you, Your Honor. The Debtor calls

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1 James Dondero.

2 THE COURT: All right.

3 A VOICE: He had to step down the hall. We had a  
4 little trouble getting through security. Let me --

5 THE COURT: All right. Mr. Dondero, you've been  
6 called as the next witness. So if you'll approach our witness  
7 stand, please. All right. Please raise your right hand.

8 (The witness is sworn.)

9 THE COURT: All right. Please be seated.

10 JAMES D. DONDERO, DEBTOR'S WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. MORRIS:

13 Q Good afternoon, Mr. Dondero.

14 A Good afternoon.

15 Q Can you hear me?

16 A Yes.

17 Q Okay. So, you were here this morning, correct?

18 A Yes.

19 Q All right. So, we're going to put up -- we'll put it up  
20 on the screen, but if you'd prefer to look at a hard copy in  
21 the binder that's marked Volume 1 of -- 2 of 2, I'd ask you to  
22 turn to Exhibit 25. Or you could just follow on the screen.  
23 And this is a one-page document, so maybe that's easier.

24 A Sure.

25 Q Do you have it? All right.

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1 A Yes.

2 Q This is the organizational chart for what's known as the  
3 DAF, correct?

4 A Yes.

5 Q And Mark Patrick set up this structure, correct?

6 A I believe he coordinated. I believe it was set up by  
7 third-party law firms. I believe it was Hutton or a firm like  
8 that.

9 Q Mr. Patrick participated in the creation of this structure  
10 because you gave him the task of setting up a charitable  
11 entity for Highland at that time, correct?

12 A Yes.

13 Q And you approved of this organizational structure,  
14 correct?

15 A Yes.

16 Q And Grant Scott was the Trustee of the DAF for a number of  
17 years, correct?

18 A I often use that word, trustee, but technically I think  
19 it's managing member.

20 Q That's right. I appreciate that. I was using your word  
21 from the deposition. But is it fair to say that, to the best  
22 of your knowledge, Grant Scott was the sole authorized  
23 representative of the entity known as the DAF from 2011 until  
24 just recently?

25 A Sole -- I would describe it more he was in a trustee

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1 function.

2 Q Uh-huh.

3 A Advice was being provided by Highland on the investment  
4 side. He wasn't expected to be a financial or an investment  
5 expert. And then accounting, tax, portfolio, tracking, you  
6 know, compliance with all the offshore formation documents,  
7 that was all done by Highland as part of a shared services  
8 agreement.

9 Q Okay. I appreciate that, but listen carefully to my  
10 question. All I asked you was whether he was the authorized  
11 representative, the sole authorized representative for the  
12 ten-year period from 2011 until recently.

13 A Yes.

14 Q Okay.

15 A I believe so.

16 Q Thank you. You served as the managing member of the DAF  
17 GP, LLC before Mr. Scott, correct?

18 A Yes.

19 Q Okay. And if you turn to Exhibit 26 in your binder,  
20 that's the amended and restated limited liability company  
21 agreement for the DAF GP, LLC, correct?

22 A Yes.

23 Q And on the last page, that's your signature line, right?

24 A Yes.

25 Q And you stepped down as the managing member on March 12,

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1 2012, and were replaced by Mr. Scott, correct?

2 A Yes.

3 Q And as you recall it, Mr. Scott came to be appointed the  
4 trustee of the DAF based on your recommendation, right?

5 A Based on my recommendation? Yes, I would say that's fair.

6 Q And you made that recommendation to Mr. Patrick, right?

7 A I -- I don't remember who I made the recommendation to.  
8 But I would echo the testimony of Mark Patrick earlier that  
9 the purpose of stepping down was to make the DAF unaffiliated  
10 or independent versus being in any way affiliated.

11 MR. MORRIS: I move to strike.

12 BY MR. MORRIS:

13 Q And I'd ask you to listen carefully to my question.

14 THE COURT: Sustained.

15 BY MR. MORRIS:

16 Q You made the recommendation to Mr. Patrick, correct?

17 A I would give the same answer again.

18 Q Okay.

19 MR. MORRIS: Can we please put up Mr. Dondero's  
20 deposition transcript from last Friday at Page 297?

21 I believe, Your Honor, that the court reporter thought  
22 that this was a continuation of a prior deposition, and that's  
23 why the pages begin in the, you know, high in the 200s and not  
24 at Page 1. Just to avoid any confusion.

25 BY MR. MORRIS:

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1 Q Mr. Dondero, do you see the transcript in front of you?

2 A Yes.

3 Q Okay. Were you asked this question and did you give this  
4 answer? "Who did you make the" -- question, "Who did you make  
5 the recommendation to?" Answer, "It would have been Mark  
6 Patrick."

7 A I don't recall right now as I sit here, and it seems like  
8 I was speculating when I answered, but it -- it probably would  
9 have been Mark Patrick. I just don't have a specific  
10 recollection.

11 Q You made the recommendation to Mr. Patrick because he was  
12 responsible for setting up the overall structure, correct?

13 A I -- I can't testify to why I did something I don't  
14 remember. I think that would be --

15 Q Can we --

16 A -- speculative.

17 Q Are you finished, sir?

18 A Yeah.

19 Q Okay.

20 MR. MORRIS: Can we go to Page 299, please?

21 BY MR. MORRIS:

22 Q Lines 6 through 10. Did I ask this question and did you  
23 give me this answer? Question, "But why did you select Mr.  
24 Patrick as the person to whom to make your recommendation?"  
25 Answer, "Because he was responsible for setting up the overall

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1 structure."

2       Were you asked that question and did you give that answer  
3 last Friday?

4 A     Yes.

5 Q     Thank you. But it's your testimony that you don't really  
6 know what process led to Mr. Scott's appointment, correct?

7 A     No, I -- I said I was refreshed by Mark Patrick's  
8 testimony earlier.

9 Q     Yeah. Were you refreshed that, in fact, you specifically  
10 had the authority to and did appoint Grant Scott as the  
11 managing member of the DAF GP, LLC?

12 A     I -- I don't know.

13 Q     Well, you're referring to Mr. Patrick's testimony and I'm  
14 asking you a very specific question. Did you agree -- is your  
15 memory refreshed now that you're the person who put Grant  
16 Scott in the position in the DAF?

17 A     I -- I don't know if I owned those secret shares that --  
18 well, they're not secret, but shares that could appoint  
19 anybody on the planet. I guess if I was in that box at that  
20 time before Grant, then I would have had that ability. I'm  
21 not denying at all that I recommended Grant. I'm just saying  
22 I don't -- I don't remember if I went specifically to him or  
23 if it was Thomas Surgent that was orchestrating it at the  
24 time. I don't remember.

25 Q     Do you deny that you had the authority to and that you did

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1 appoint Grant Scott as your successor?

2 MR. TAYLOR: Your Honor, objection to the extent it  
3 calls for a legal conclusion. I can't get close to a mic, so  
4 --

5 THE COURT: I overrule the objection.

6 THE WITNESS: Can you repeat the question for me?

7 BY MR. MORRIS:

8 Q Do you deny that you had the authority to and that you  
9 did, in fact, appoint Grant Scott as your successor?

10 A It'd be better to say I don't -- I don't -- no, I don't  
11 remember or I didn't know the details at the time. But,  
12 again, I -- I assume I owned those shares. And, again, I do  
13 remember recommending Grant and -- but exactly how it  
14 happened, I don't remember.

15 Q Did you hear Mark Patrick say just an hour ago that you  
16 appointed Grant Scott as your successor?

17 MR. SBAITI: Objection, Your Honor. Misstates  
18 testimony. The witness testified he transferred shares.  
19 That's different than an appointment power.

20 THE COURT: Response? I can't remember the exact way  
21 you worded it, to be honest.

22 MR. MORRIS: Neither can I, but I'll even take it  
23 that way.

24 THE COURT: Okay.

25 MR. MORRIS: I think he's wrong, but I'll even take

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1 it that way.

2 THE COURT: Okay.

3 BY MR. MORRIS:

4 Q Mr. Dondero, did you listen to Mark Patrick say that you  
5 are the person who made the decision to transfer the shares to  
6 Mr. Scott in 2012?

7 A Yes, I heard him say that.

8 Q Okay. So, do you -- do you dispute that testimony?

9 A I -- I don't have any better knowledge to dispute or  
10 confirm.

11 Q You and Mr. Scott have known each other since high school,  
12 correct?

13 A Yes.

14 Q You spent a couple of years at UVA together, correct?

15 A Yes.

16 Q You were housemates together, correct?

17 A Yes.

18 Q He was the best man at your wedding, correct?

19 A Yes.

20 Q He's a patent lawyer, correct?

21 A Yes.

22 Q He had no expertise in finance when -- when he was  
23 appointed as your successor to the DAF, correct?

24 A Correct.

25 Q To the best of your knowledge, at the time Mr. Scott

Dondero - Direct

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1 assumed his position, he had never made any decisions  
2 concerning collateralized loan obligations, correct?

3 A Correct, but he wasn't hired for that. That wasn't his  
4 position.

5 Q Was he the person who was going to make the decisions with  
6 respect to the DAF's investments?

7 A My understanding on how it was structured was the DAF was  
8 paying a significant investment advisory fee to Highland.  
9 Highland was doing portfolio construction and the investment  
10 selection of -- or the investment recommendations for the  
11 portfolio. There is an independent trustee protocol that I  
12 believe was adhered to, but it was never my direct  
13 involvement. It was always the portfolio managers or the  
14 traders.

15 You have to provide three similar or at least two other  
16 alternatives, and then with a rationale for each of them, but  
17 a rationale for why you think one in particular is better.  
18 And the trustee looks at the three, evaluates them. And the  
19 way I understand it always worked, that it works at pretty  
20 much every charitable trust or trust that I'm aware of, they  
21 generally, if not always, pick alongside the -- or, pick the  
22 recommendation of their highly-paid investment advisory firm.

23 Q And are you the highly-paid investment advisory firm?

24 A Highland was at the time, yes.

25 Q And you controlled Highland, right?

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1 A Yes.

2 Q Okay. But at the end of the day, is it your understanding  
3 that Mr. Scott had the exclusive responsibility for making  
4 actual decisions on behalf of the charitable trust that you  
5 had created?

6 A Yeah, I mean, subject to the protocol I just described.

7 Q Yeah, okay, so let's keep going. Mr. Scott had no  
8 experience or expertise running charitable organizations at  
9 the time you decided to transfer the shares to him, correct?

10 A Yes, I believe that's correct.

11 Q Okay. You didn't recommend Mr. Scott to serve as the  
12 DAF's investment advisor, did you?

13 A No.

14 Q And until early 2021, as you testified, I believe,  
15 already, HCMLP served as the DAF's investment advisor,  
16 correct?

17 A Yes.

18 Q And until early 2021, all of the DAF's day-to-day  
19 operations were conducted by HCMLP pursuant to a shared  
20 services agreement, correct?

21 A Yes.

22 Q And from the time the DAF was formed until January 9,  
23 2020, you controlled HCMLP, correct?

24 A Yes.

25 Q You can't think of one investment decision that HCMLP

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1 recommended that Mr. Scott ever rejected in the ten-year  
2 period, correct?

3 MR. SBAITI: Objection, Your Honor. Lacks  
4 foundation.

5 THE COURT: Response?

6 MR. MORRIS: I'm not quite sure what to say, Your  
7 Honor. The witness has already testified that HCMLP was the  
8 investment advisor, made recommendations to Mr. Scott, and  
9 that Mr. Scott was the one who had to make the investment  
10 decisions at the end of the day.

11 MR. SBAITI: He's not here as a witness for HCMLP.  
12 He's here in his personal capacity. There's no foundation  
13 he'd have personal knowledge of which specific investments  
14 were proposed, which ones were rejected or accepted. He said  
15 it was done by the portfolio manager.

16 THE COURT: Okay. I overrule. He can answer if he  
17 has an answer.

18 BY MR. MORRIS:

19 Q Sir, you can't think of one investment decision that HCMLP  
20 ever recommended to Mr. Scott that he rejected, correct?

21 A I can't think of one, but I would caveat with I wouldn't  
22 have expected there to be any.

23 Q So you expected him to just do exactly what HCMLP  
24 recommended, correct?

25 A No. I would expect him to sort through the various

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1 investments when he was given three or four to choose from and  
2 be able to discern that, just as we had with our expertise,  
3 which was much greater than his, discern which one was the  
4 best and most suitable investment, the best risk-adjusted  
5 investment, that he would come to the same conclusion.

6 Q Okay. You can't think of an investment that Mr. Scott  
7 ever made on behalf of the DAF that didn't originate with  
8 HCMLP, correct?

9 A Again, no, but I wouldn't expect there to be.

10 Q Okay. And that's because you expected all of the  
11 investments to originate with the company that you were  
12 controlling, correct?

13 A We were the hired investment advisor with fiduciary  
14 responsibility --

15 Q Uh-huh.

16 A -- and with a vested interest in making sure the DAF  
17 performance was the best it could be.

18 Q Okay. Let --

19 A He was, as you said, a patent attorney. It would have  
20 been unusual for him to second-guess. I'm sure, in any  
21 private investment or any investment that was one off or  
22 didn't have comps, you know, he probably sought third-party  
23 valuations. But you would have to talk to him about that, or  
24 the people at Highland that did that.

25 MR. MORRIS: I move to strike. It's a very simple

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1 question.

2 THE COURT: Sustained.

3 BY MR. MORRIS:

4 Q Sir, you can't think of one investment that Mr. Scott made  
5 on behalf of the DAF that did not originate with HCMLP,  
6 correct?

7 A I'm going to give the same answer.

8 Q Okay. Let's go to Page 371 of the transcript, please.  
9 Lines 7 through 11.

10 Oh, I apologize. I think I might -- I think I meant 317.  
11 I think I got that inverted. Yeah.

12 Did I ask this question and did you give this answer:  
13 "Can you think of any investment that Mr. Scott made on behalf  
14 of the DAF that didn't original with HCMLP?" Answer, "He  
15 wasn't the investment advisor, but no, I don't -- I don't  
16 recall."

17 Is that the answer you gave on Friday?

18 A Yes.

19 Q Thank you. Let's --

20 MR. SBAITI: Just for clarification, Your Honor, --

21 THE COURT: Pardon?

22 MR. SBAITI: -- the deposition was last Tuesday, not  
23 on Friday.

24 MR. MORRIS: I stand corrected, Your Honor.

25 THE COURT: Okay.

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1 MR. MORRIS: I apologize.

2 THE COURT: Okay.

3 MR. MORRIS: I apologize if the Court thinks I misled  
4 it.

5 BY MR. MORRIS:

6 Q Let's talk about Mr. Scott's decision during the  
7 bankruptcy case that preceded his resignation. After HCMLP  
8 filed for bankruptcy, CLO Holdco, Ltd. filed a proof of claim,  
9 correct?

10 MR. ANDERSON: Your Honor, I haven't objected yet,  
11 but we literally haven't covered anything that deals with  
12 commencing or pursuing a claim or cause of action. I'm going  
13 to object. This is way outside, again, the bounds of the  
14 contempt hearing. It's -- otherwise, it's other discovery for  
15 something else. It literally has nothing to do with pursue a  
16 claim or cause of action.

17 THE COURT: We have another relevance objection.

18 Your response?

19 MR. MORRIS: Your Honor, the evidence is going to  
20 show that Mr. Dondero told Mr. Scott on three separate  
21 occasions that his conduct, which were acts of independence,  
22 were inappropriate and were not in the best interests of the  
23 DAF. Within days of the third strike, he resigned. Okay?

24 I think it's relevant to Mr. Dondero's control of the DAF.  
25 I think that the moment that Mr. -- this is the argument I'm

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1 going to make. I'll make it right now. You want me to make  
2 it now, I'll make it now. The moment that Mr. Scott exercised  
3 independence, Mr. Dondero was all over him, and Mr. Scott  
4 left. That's what happened. The evidence is going to be  
5 crystal clear.

6 And I think that that control of the DAF is exactly what  
7 led to this lawsuit. And what led -- and I'm allowed to make  
8 my argument. So that's why it's relevant, Your Honor, because  
9 I think it shows that Mr. Scott -- Mr. Scott, after exercising  
10 independence, was forced out.

11 MR. ANDERSON: That doesn't move the needle one bit  
12 as to whether a lawsuit was commenced or a claim or cause of  
13 action was pursued, which is the subject of the contempt  
14 motion. It doesn't move the needle one bit as to those two  
15 issues, as to whether that has any bearing on was it commenced  
16 or was it pursued.

17 MR. MORRIS: Your Honor, I appreciate the very narrow  
18 focus that counsel for a different party is trying to put on  
19 this, but it is absolutely relevant to the question of whether  
20 Mr. Dondero was involved in the pursuit of these claims. All  
21 right? That's what the order says. Pursue.

22 THE COURT: All right. Overruled.

23 BY MR. MORRIS:

24 Q After HCMIP filed for bankruptcy, CLO Holdco filed a proof  
25 of claim, correct?

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1 A I believe so.

2 Q And in the fall of 2020, Mr. Scott amended the proof of  
3 claim to effectively reduce it to zero, correct?

4 A I -- I guess.

5 Q And Mr. Scott made that decision without discussing it  
6 with you in advance, correct?

7 A Yes.

8 Q But you did discuss it with him after you learned of that  
9 decision, correct?

10 A I don't -- I don't recall. I'm willing to be refreshed,  
11 but I don't remember.

12 Q Well, you told him specifically that he had given up bona  
13 fide claims against the Debtor, correct?

14 A Let me state or clarify my testimony this way. Um, --

15 MR. MORRIS: Your Honor, it's really just a yes or no  
16 question. His counsel can ask him if he wants to clarify, but  
17 it's really just a yes or no question.

18 BY MR. MORRIS:

19 Q You told Mr. Scott that he gave up bona fide claims  
20 against the Debtor, correct?

21 THE COURT: Okay.

22 THE WITNESS: I don't know if I told him then with  
23 regard to those claims.

24 BY MR. MORRIS:

25 Q Okay. Can we go to Page 321 of the transcript? At the

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1 bottom, Line 21? 22, I apologize.

2 Did I ask this question and did you give this answer?

3 "And what do you" -- Question, "And what do you recall about  
4 your discussion with Mr. Scott afterwards?" Answer, "That he  
5 had given up bona fide claims against the Debtor and I didn't  
6 understand why."

7 Did I ask that question and did you give that answer last  
8 Tuesday?

9 A Yes.

10 Q Okay. A short time later, in December, the Debtor filed  
11 notice of their intention to enter into a settlement with  
12 HarbourVest, correct?

13 A Yes.

14 Q And CLO Holdco, under Mr. Scott's direction, filed an  
15 objection to that settlement, correct?

16 A Yes.

17 Q And that settlement, the substance of that settlement was  
18 that the Debtor did not have the right to receive  
19 HarbourVest's interests in HCLOF at the time, correct?

20 A I don't remember the exact substance of it.

21 Q Okay. But you do remember that you learned that Mr. Scott  
22 caused CLO Holdco to withdraw the objection, correct?

23 A Yes, ultimately.

24 Q Okay. And again, Mr. Scott did not give you advance  
25 notice that he was going to withdraw the HarbourVest

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1 objection, correct?

2 A No, he -- he did it an hour before the hearing. He didn't  
3 give anybody notice.

4 Q You learned that Mr. Scott caused CLO Holdco to withdraw  
5 its objection to the HarbourVest settlement at the hearing,  
6 correct?

7 A Yes.

8 Q And you were surprised by that, weren't you?

9 A I believe everybody was.

10 Q You were sur... you were surprised by that, weren't you,  
11 sir?

12 A Yes.

13 Q And you were surprised by that because you believed Mr.  
14 Scott's decision was inappropriate, right?

15 A Partly inappropriate, and partly because 8:00 o'clock the  
16 night before he confirmed that he was going forward with the  
17 objection. And I think the DAF's objection was scheduled to  
18 be first, I think.

19 Q After you learned that Mr. Scott instructed his attorneys  
20 to withdraw the CLO Holdco objection to the HarbourVest  
21 settlement, you again spoke with Mr. Scott, correct?

22 A Yes.

23 Q And that conversation took place the day of the hearing or  
24 shortly thereafter, correct?

25 A Yes.

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1 Q And during that conversation, you told Mr. Scott that it  
2 was inappropriate to withdraw the objection, correct?

3 A Yes.

4 Q And in response, Mr. Scott told you that he followed the  
5 advice of his lawyers, correct?

6 A Yes.

7 Q But that didn't -- that explanation didn't make sense to  
8 you, right?

9 A Yes.

10 Q In fact, you believed that Mr. Scott failed to act in the  
11 best interests of the DAF and CLO Holdco by withdrawing its  
12 objection to the HarbourVest settlement, correct?

13 A Yes.

14 Q And while you didn't specifically use the words fiduciary  
15 duty, you reminded Mr. Scott in your communications with him  
16 that he needed to do what was in the best interests of the  
17 DAF, correct?

18 A Yes.

19 Q You're the founder of the DAF, correct?

20 A I put it -- I put it in motion. Yeah. I tasked Mark  
21 Patrick and third-party law firms to do it, but if that boils  
22 down to founder, I guess yes.

23 Q Uh-huh. And you're the primary donor to the DAF, correct?

24 A Yes.

25 Q You're the investment advisor to the DAF, or at least you

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1 were at that time?

2 A Yes.

3 Q And because you served in these roles, you expected Mr.  
4 Scott to discuss his decision to withdraw the HarbourVest  
5 objection in advance, correct?

6 A Yes, I -- I think it was even broader than that. I mean,  
7 he was having health and anxiety issues, and to the extent he  
8 felt overwhelmed, I -- you know, yeah, you should do what's in  
9 the best interests at all times, but -- but yes, I thought it  
10 would be helpful if he conferred with me or Mark Patrick or  
11 whoever he was comfortable with.

12 Q Mr. Dondero, you specifically believed that Mr. Scott's  
13 failure to tell you that he was going to withdraw the  
14 HarbourVest objection in advance was inappropriate, right?

15 A Yes.

16 Q Even though he was the sole authorized representative, you  
17 believed that, because you were the founder of the DAF, the  
18 primary donor of the DAF, and the investment advisor to the  
19 DAF, he should have discussed that before he actually made the  
20 decision, correct?

21 A No. What I'm saying is at 8:00 o'clock at night, when he  
22 confirms to numerous people he's ready to go first thing with  
23 his objection, and then he or counsel or some combination of  
24 them change their mind and don't tell anybody before the  
25 hearing, that's odd and inappropriate behavior.

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1 MR. MORRIS: Can we go to Page 330 of the transcript,  
2 please?

3 And Your Honor, before I read the testimony, there is an  
4 objection there. So I'd like you to rule --

5 THE COURT: Okay.

6 MR. MORRIS: -- before I do that. It can be found at  
7 -- on Page 330 at Line 21.

8 (Pause.)

9 MR. MORRIS: Here we go. Page 30, beginning at Line  
10 19. 330, rather.

11 THE COURT: Okay.

12 (Pause.)

13 THE COURT: Okay. I overrule that objection.

14 BY MR. MORRIS:

15 Q Mr. Dondero, were you asked this question and did you give  
16 this answer last Tuesday? Question, "Do you believe that he  
17 had an obligation to inform you in advance?" Answer, "I don't  
18 know if I would use the word obligation, but, again, as the  
19 founder or the primary donor and continued donor to the DAF,  
20 and as the investment advisor fighting for above-average  
21 returns on a daily basis for the fund, significant decisions  
22 that affect the finances of the fund would be something I  
23 would expect typically a trustee to discuss with the primary  
24 donor."

25 Did you give that answer the other day, sir?

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1 A Yes.

2 Q If Mr. Patrick decides tomorrow to withdraw the lawsuit  
3 that's in District Court, does he have an the obligation to  
4 tell you in advance?

5 A Again, I wouldn't use the word obligation. But something  
6 that I think ultimately is going to be a \$20 or \$30 million,  
7 if not more, benefit to the DAF, to the detriment of Highland,  
8 if you were to give that up, I would expect him to have a  
9 rationale and I would expect him to get other people's  
10 thoughts and opinions before he did that.

11 Q Okay. But does he have to get your opinion before he  
12 acts?

13 A No, he does not.

14 Q Okay. So he -- Mr. Patrick could do that tomorrow, he  
15 could settle the case, and if he doesn't come to you to  
16 discuss it in advance, you won't be critical of him, right?

17 A He doesn't have the obligation, but there's -- there's a  
18 reasonableness in alignment of interests. I -- a growing  
19 entrepreneur sets up a trust, a lot of times they'll put their  
20 wife in charge of it, and she hires investment advisers and  
21 whatever, but they've got the best interests at mind for the  
22 charity or the children or whatever.

23 You know, people who go rogue and move in their own self-  
24 interest or panic, that stuff can happen all the time. It  
25 doesn't make it appropriate, though.

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1 Q A couple of weeks after Mr. Scott withdraw the objection  
2 to the HarbourVest settlement, he entered into a settlement  
3 agreement with the Debtor pursuant to which he settled the  
4 dispute between the Debtor and CLO Holdco, correct?

5 A Yes.

6 Q Okay. You didn't get advance notice of that third  
7 decision, correct?

8 A No.

9 Q Can we go to Page -- Exhibit 32 in your binder? And this  
10 is the settlement agreement between CLO Holdco and the Debtor,  
11 correct? Attached as the exhibit. I apologize.

12 A Yes.

13 Q And do you understand that that's Mr. Scott's signature on  
14 the last page?

15 A Yep.

16 Q And you learned about this settlement only after it had  
17 been reached, correct?

18 A Yep.

19 Q And you believed Mr. Scott's decision not to pursue  
20 certain claims against the Debtor or to remove HCMLP as the  
21 manager of the CLOs was not in the best interests of the DAF,  
22 correct?

23 A Correct.

24 Q And you let Mr. Scott know that, correct?

25 A Yes.

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1 Q After learning about the settlement agreement on January  
2 26th, you had one or two conversations with Mr. Scott on this  
3 topic, correct?

4 A Yes.

5 Q And your message to Mr. Scott was that the compromise or  
6 settlement wasn't in the DAF's best interest, correct?

7 A It was horrible for the DAF.

8 Q Uh-huh. And you told him that, right?

9 A Yes.

10 Q Okay. From your perspective, any time a trustee doesn't  
11 do what you believe is in the trust's best interest, you leave  
12 yourself open to getting sued, correct?

13 A Who is "you" in that question?

14 Q You. Mr. Dondero.

15 A Can you repeat the question, then, please?

16 Q Sure. From your perspective, any time you're a trustee  
17 and you don't believe that the trustee is doing what's in the  
18 best interests of the fund, the trustee leaves himself open to  
19 getting sued, correct?

20 A I don't know who the trustee leaves himself open to, but  
21 as soon as you go down a path of self-interest or panic, you  
22 -- you potentially create a bad situation. But I don't know  
23 who holds who liable.

24 Q Did you believe that Mr. Scott was acting out of self-  
25 interest or panic when he decided to settle the dispute with

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1 the Debtor on behalf of CLO Holdco?

2 A Yes.

3 Q Did you tell him that?

4 A He told me that.

5 Q He told you that he was acting out of panic or  
6 desperation? With self-int... withdrawn. Withdrawn. Did he  
7 tell you that he was acting out of self-interest?

8 A He was having health problems, anxiety problems, and he  
9 didn't want to deal with the conflict. He didn't want to  
10 testify. He didn't want to come to court. He didn't want to  
11 do those things. And I told him I didn't think the settlement  
12 was going to get him out of that stuff. I think, you know, it  
13 got him out of some issues, but I think you guys are going to  
14 go after him for other stuff. But he -- he panicked.

15 MR. MORRIS: I move to strike the latter remark.

16 THE COURT: Sustained.

17 BY MR. MORRIS:

18 Q Shortly after you had the conversation with Mr. Scott, he  
19 sent you notice of his intent to resign from his positions at  
20 the DAF and CLO Holdco, correct?

21 A Yes.

22 Q Okay. Let's take a look at that, please. Exhibit 29.  
23 This is Mr. Scott's notice of resignation, correct?

24 A Yes.

25 Q He sent it only to you, correct?

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1 A Yes.

2 Q A couple of days before he sent this, he told you he was  
3 considering resigning; isn't that right?

4 A Yes.

5 Q Okay. And he told you he was considering resigning  
6 because he was suffering from health and anxiety issues  
7 regarding the confrontation and the challenges of  
8 administering the DAF given the bankruptcy, correct?

9 A Yes.

10 Q He didn't tell you that he made the decision -- withdrawn.  
11 Did you tell him in this same conversation -- withdrawn. Is  
12 this the same conversation where you conveyed the message that  
13 the compromise or settlement wasn't in the best interests of  
14 the DAF?

15 A You mean the conversation -- or the resignation? Is that  
16 -- can you rephrase the question, please?

17 Q Yeah, I apologize. It's my fault, sir. You testified  
18 that after the January 26th hearing you had a conversation  
19 with Mr. Scott where you told him that the compromise or  
20 settlement was not in the best interests of the DAF, correct?

21 A Yes.

22 Q Okay. Did Mr. Scott share with you his concerns about  
23 anxiety and health issues in that same conversation, or was it  
24 in a subsequent conversation?

25 A It was at or around that time. I -- I don't remember

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1 which conversation.

2 Q Okay.

3 A But it was right at or around that time.

4 Q All right. You never asked Mr. Scott to reconsider, did  
5 you?

6 A No.

7 Q You don't recall sending this notice of resignation to  
8 anyone, do you?

9 A No.

10 Q You don't remember notifying anyone that you'd received  
11 notice of Mr. Scott's intent to resign from the DAF, do you?

12 A It was -- yeah, no, I -- I don't remember. It was a busy  
13 time around that time and this was a secondary issue.

14 Q Okay. So the fact that the person who has been running  
15 the DAF for a decade gives you and only you notice of his  
16 intent to resign was a secondary issue in your mind?

17 A Yes, because when I talked to him at about that time, I  
18 said, okay, well, it's going to take a while. I don't even  
19 know how the mechanism works. But don't do anything adverse  
20 to the DAF, don't do anything else until, you know, you've  
21 figured out transition.

22 Q Uh-huh.

23 A And so once he had confirmed he wouldn't do anything  
24 outside normal course until he transitioned, I didn't worry  
25 about this. I had bigger issues to worry about at the time.

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1 Q In the third paragraph of his email to you, he wrote that  
2 his resignation will not be effective until he approves of the  
3 indemnification provisions and obtains any and all necessary  
4 releases. Do you see that?

5 A Yes.

6 Q And that was the condition that on January 31st Mr. Scott  
7 placed on the effectiveness of his resignation, correct?

8 A Condition? Yeah, I -- I think he's trying to state the  
9 timing will happen after that.

10 Q After he gets the release, right?

11 A Yes.

12 Q And he wanted the release because you'd told him three  
13 different times that he wasn't acting in the best of the DAF,  
14 correct?

15 MR. TAYLOR: Objection, Your Honor.

16 MR. SBAITI: Objection. Calls for --

17 MR. TAYLOR: Objection. Calls for speculation.

18 THE WITNESS: Yeah, I --

19 THE COURT: Sustained.

20 THE WITNESS: I can't take that jump. Yeah.

21 BY MR. MORRIS:

22 Q In response to this email from your lifelong friend, you  
23 responded, if we could scroll up, about whether divest was a  
24 synonym -- if we can look at the first one -- whether divest  
25 is a synonym for resigned. Do I have that right?

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1 A (no immediate response)

2 Q If you will look at your response on Monday morning at  
3 9:50.

4 A Yes.

5 Q Okay. And then after Mr. Scott responds, you respond  
6 further, if we can scroll up, and you specifically told him,  
7 "You need to tell me ASAP that you have no intent to divest  
8 assets." Correct?

9 A Yes.

10 Q And you wrote that because you believed some of his  
11 behavior was unpredictable, right?

12 A I think I wrote that because the term divest in investment  
13 terms means sale or liquidate, but I guess it had a different  
14 legal term in the way he was looking at it. I wasn't aware at  
15 that time of the shares that could be bequeathed to anybody,  
16 and I think the divest refers to that, but I wasn't aware that  
17 that's how the structure worked at that time, and I was  
18 worried that divest could be the investment term and I -- it  
19 wouldn't have been appropriate for him to liquidate the  
20 portfolio.

21 Q So, and you wanted to make sure he wasn't liquidating or  
22 intending to liquidate any of the CLOs, correct?

23 A Correct.

24 Q Okay. So he's still the authorized, the sole authorized  
25 representative, but you wanted to make sure that he didn't do

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1 anything that you thought was inappropriate. Fair?

2 A It's because I had talked to him before this and he said  
3 he wasn't going to do anything outside normal course, and then  
4 the word divest scared me, but I didn't realize it was a legal  
5 term in this parlance here.

6 Q And so after he explained, you still wanted to make sure  
7 that he wasn't divesting any assets, correct?

8 A Yes.

9 Q Okay. Since February 1st, you've exchanged exactly one  
10 text messages with Mr. Scott; is that right?

11 A I think there've been several, several text messages. But  
12 one on his birthday.

13 Q Yeah. And you haven't spoken to him in months, correct?

14 A In a couple months, yes.

15 Q All right. Let's talk about the replacement of Mr. Scott.  
16 With -- with Mr. Scott's notice, someone needed to find a  
17 replacement, correct?

18 A Yes.

19 Q And the replacement was going to be responsible for  
20 managing a charitable organization with approximately \$200  
21 million of assets, most of which was seeded directly or  
22 indirectly through you, correct?

23 A Yes.

24 Q And the replacement was going to get his and her -- his or  
25 her investment advice from you and NexPoint Advisors; do I

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1 have that right?

2 A That was the plan.

3 Q Okay. Ultimately, Mr. Patrick replaced Mr. Scott,  
4 correct?

5 A Yes.

6 Q But it's your testimony that you had no knowledge that Mr.  
7 Patrick was going to replace Mr. Scott until after it happened  
8 on March 24, 2021. Correct?

9 A That's correct. I believe it happened suddenly.

10 Q So, for nearly two months after you had received notice of  
11 Mr. Scott's intent to resign, you were uninvolved in the  
12 process of selecting his replacement, correct?

13 A I was uninvolved. I'd say the process was dormant for an  
14 extended period of time until Mark Patrick came on board, and  
15 then Mark Patrick ran the process of interviewing multiple  
16 potential candidates.

17 Q Mark Patrick didn't have any authority prior to March  
18 24th, correct?

19 A Is March 24th the date that he transitioned the shares to  
20 himself from Grant Scott?

21 Q Yep.

22 A That's when he then became the trustee of the DAF, yes.

23 Q Do you know -- do you know who was instructing Mr. Patrick  
24 on who to interview or how to carry the process out?

25 A He was doing that on his own with, I think,

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1 recommendations from third-party tax firms.

2 Q So Mr. Patrick was trying to find a successor to Mr.  
3 Scott, even though he had no authority to do that, and you  
4 were completely uninvolved in the whole process? Do I have  
5 that right?

6 A I was uninvolved, yes. He was trying to facilitate it for  
7 the benefit of his friendship with Grant Scott and knowing  
8 that it -- it -- with his resignation, it had to transition to  
9 somebody. And he enjoys working on the DAF, he enjoys the  
10 charitable stuff in the community, and he was the most  
11 appropriate person to work on helping Grant transition.

12 MR. MORRIS: All right. I move to strike, Your  
13 Honor. It's hearsay.

14 THE COURT: Sustained.

15 BY MR. MORRIS:

16 Q You're aware that Mr. Seery was appointed the Debtor's CEO  
17 and CRO last summer, correct?

18 A Yes.

19 Q And you're aware that Mr. Seery's appointment was approved  
20 by the Bankruptcy Court, correct?

21 A Yes.

22 Q And you were aware of that at the time it happened,  
23 correct?

24 A Yes.

25 Q And even before that, in January of 2020, you consented to

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1 a settlement where you gave up control of the Debtor.

2 Correct?

3 A To the independent board for a consensual Chapter 11  
4 restructuring that would leave Highland intact.

5 Q And do you understand that the gatekeeper provision in the  
6 July order is exactly like the one that you agreed to in  
7 January except that it applies to Mr. Seery instead of the  
8 independent directors?

9 A I -- I learned a lot about that today, but I don't think  
10 it's appropriate to move what applied to the board to the CEO  
11 of a registered investment advisor.

12 Q Okay. I'm just asking you, sir. Listen carefully to my  
13 question. Were you aware in January 2020 that you agreed to a  
14 gatekeeper provision on behalf of the independent board?

15 A Generally, but not specifically.

16 Q Okay.

17 A Not -- not like what we've been going over today.

18 Q Okay. And you knew that Mr. Seery had applied to be  
19 appointed CEO subject to the Court's approval, correct?

20 A Wasn't it backdated to March? I -- I think the hearing  
21 was in June, but it was backdated for -- for money and other  
22 purposes, right? I -- that's my recollection. I don't  
23 remember otherwise.

24 Q You do remember that Mr. Seery got -- he got -- his  
25 appointment got approved by the Court, right?

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1 A Yes. But, as far as the dates are concerned, I thought it  
2 was either in March or retroactive to March. Maybe it was  
3 June or July.

4 Q And you --

5 A But I don't remember.

6 Q Did you have your lawyers review the motion that was filed  
7 on behalf of the Debtor?

8 A I'm -- I assume they do their job. I -- if they didn't, I  
9 don't know.

10 Q Okay. That's what you hired them to do; is that fair?

11 A Yes.

12 Q Okay. Can we go to Exhibit 12, please? I think it's in  
13 Binder 1. You've seen this document before, correct?

14 A Yes.

15 Q In fact, you saw versions of this complaint before it was  
16 filed, correct?

17 A Yes, I saw one or two versions towards the end. I don't  
18 know if I saw the final version, but --

19 Q Sir, you participated in discussions with Mr. Sbaiti  
20 concerning the substance of this complaint before it was  
21 filed, correct?

22 A Some. I would just use the word some.

23 Q Okay. Can you describe for me all of your conversations  
24 with Mr. Sbaiti concerning the substance of this complaint?

25 MR. SBAITI: Your Honor, I would object on the basis

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1 of work product privilege and attorney-client communications.  
2 He was an agent for my client, the DAF, at the time he was  
3 having these discussions with us, and our discussions with him  
4 were work product. So to the extent he can reveal the  
5 conversations without discussing the actual content, we would  
6 raise privilege objection, Your Honor.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Your Honor, there is no privilege here.  
9 That's exactly why I asked Mr. Patrick the questions earlier  
10 today. Mr. Dondero is not party to any agreement with the DAF  
11 today. It's an informal agreement, perhaps, but there is no  
12 contractual relationship, there is no privity any longer  
13 between Mr. Dondero or any entity that owns and controls in  
14 the DAF, as far as I know. If they have evidence of it, I'm  
15 happy to listen, but that -- that's exactly why I asked those  
16 questions of Mr. Patrick earlier today.

17 THE COURT: All right.

18 MR. SBAITI: Your --

19 THE COURT: That was the testimony. There's an  
20 informal arrangement, at best.

21 MR. SBAITI: Well, Your Honor, I would suggest that  
22 that doesn't necessarily mean that he isn't an agent of the  
23 DAF. It doesn't have to be a formal agreement for him to be  
24 an agent of the DAF.

25 Everyone's agreed he was an advisor. Everyone's agreed he

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1 was helping out. That is an agency relationship. It doesn't  
2 have to be written down. It doesn't have to be a formal  
3 investment advisory relationship. He's still an agent of the  
4 DAF. He was requested to do something and agreed to do it  
5 under the expectation that all of us had that those would be  
6 privileged, Your Honor. That is -- that is sufficient -- that  
7 is sufficient, I would argue, to get us where we need to be.  
8 The privilege should apply, Your Honor, and they don't have a  
9 basis for, I would say, invading the privilege, Your Honor.

10 THE COURT: Well, do you have any authority? Because  
11 it just sounds wrong. He's not an employee of your client.  
12 He doesn't have any contractual arrangement with your client.

13 MR. SBAITI: Your Honor, I would dispute the idea  
14 that he has no contractual arrangement with my client. The  
15 question was asked, do you have a -- do you have a written  
16 agreement, and then the question was, so you don't have a  
17 contract, and the answer was no, I don't have a contract,  
18 building upon that first -- that first question. But the  
19 testimony as he just recounted is that there is an agreement  
20 that he would advise Mr. Patrick and he would advise the DAF.

21 THE COURT: Okay.

22 MR. SBAITI: That's -- that's a contract.

23 THE COURT: Okay. My question was, do you have any  
24 legal authority? That's what I meant when I said authority.  
25 Any legal authority to support the privilege applying in this

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1 kind of --

2 MR. SBAITI: In an informal arrangement, Your Honor?  
3 I don't have one at my fingertips at the moment, Your Honor,  
4 but I don't know that that should be a reason to invade the  
5 privilege.

6 And I would just add, Your Honor, I would just add, we've  
7 already -- because of the purpose of these questions, you've  
8 heard Mr. Morris state several times that the purpose is to  
9 show that Mr. -- that Mr. Dondero had some role in advising  
10 and participating in the creation of this complaint. That's  
11 been conceded by myself. I believe it was conceded by Mr.  
12 Dondero.

13 The actual specific facts, the actual specific  
14 conversations, Your Honor, shouldn't be relevant at this point  
15 and they shouldn't be admissible, given -- given the  
16 relevancy, given the perspective of the privilege.

17 THE COURT: Okay.

18 MR. MORRIS: If I might --

19 THE COURT: I overrule your objection. I don't think  
20 a privilege has been shown here --

21 MR. SBAITI: And Your Honor, --

22 THE COURT: -- and I think it's relevant.

23 MR. SBAITI: -- I would ask if we could voir dire the  
24 witness on the basis of the privilege, if that's --

25 THE COURT: All right. You may do so.

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1 VOIR DIRE EXAMINATION

2 BY MR. SBAITI:

3 Q Mr. Dondero, do you have a relationship with the DAF?

4 A Yes.

5 Q How would you describe that relationship?

6 A I view myself and my firm as the investment advisor. I  
7 was actually surprised by the testimony today that there  
8 wasn't a contract in place, but there should be one. There  
9 should be one soon, in my opinion.

10 Q Have you -- did you hear Mr. Patrick testify earlier that  
11 he comes to you for advice?

12 A Yes.

13 Q Is that --

14 A As he should. Yeah.

15 Q Is that true?

16 A Yes.

17 Q When you render that advice, do you render that advice  
18 with some expectation about him following or listening to that  
19 advice?

20 A Okay, I think there's only been one investment or one  
21 change in the DAF portfolio since Mark Patrick's been  
22 involved, only one, and it was a real estate investment that I  
23 wasn't directly involved in. And so the people who put that  
24 investment forward worked with Mark without my involvement,  
25 and then I think Mark got third-party appraisal firms and

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1 third-party valuation firms involved to make sure he was  
2 comfortable, which was a good process.

3 Q When you supplied information to Mr. Patrick, do you do so  
4 under the belief that there is a contractual, informal or  
5 formal, relationship?

6 MR. MORRIS: Objection to the form of the question.

7 THE COURT: Overruled.

8 MR. SBAITI: What specific form?

9 THE COURT: Overruled.

10 MR. SBAITI: Thank you.

11 THE WITNESS: Yes. I believe it -- it's a  
12 relationship that can and should be papered as -- soon.  
13 That's my -- I mean, unless I get some reason from counsel not  
14 to, I think it's something that should be memorialized.

15 BY MR. SBAITI:

16 Q And when you have that -- in that relationship, when you  
17 communicate with Mr. Patrick about matters, investment or  
18 otherwise, is there an expectation of privacy?

19 A Yes.

20 Q When Mr. Patrick -- did Mr. Patrick request that you  
21 interface with my firm and myself, as he testified earlier?

22 A Yes.

23 Q And when he did so, did he ask you to do so in an  
24 investigatory manner?

25 MR. MORRIS: Objection to the form of the question.

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1 THE COURT: Sustained. Rephrase.

2 BY MR. SBAITI:

3 Q Did he tell you why he wanted you to talk to us?

4 A Yeah. At that point, he had started an investigation into  
5 the HarbourVest transaction.

6 Q And -- and when he -- when you were providing information  
7 to us, did he tell you whether he wanted you to help the  
8 Sbaiti firm conduct the investigation?

9 A The -- overall, the financial numbers and tables in there  
10 were prepared by not myself, but I -- I did -- I did help on  
11 -- on the -- some of the registered investment advisor issues  
12 as I understood them.

13 Q Okay. And the communications that you had with us, was  
14 that part of our investigation?

15 MR. MORRIS: Objection to the form of the question.

16 THE COURT: Overruled.

17 THE WITNESS: Yes.

18 BY MR. SBAITI:

19 Q And did you understand that we had been retained by Mr.  
20 Patrick on behalf of the DAF and CLO Holdco?

21 A Yes.

22 Q And did you appreciate or have any understanding of  
23 whether or not you were helping the law firm perform its legal  
24 function on behalf of the DAF and CLO Holdco?

25 A Perform its legal function? I was just helping with

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1 regard to the registered investment advisor aspects of the  
2 overall, you know, like that.

3 Q Let me ask a more simple question. Did you -- did you  
4 appreciate that you were assisting a law firm in its  
5 representation of the DAF?

6 A Yes.

7 Q And you were helping the law -- and were you helping the  
8 law firm develop the facts for a complaint?

9 A Yes. I would almost say, more importantly, I wanted to  
10 make sure that there weren't errors in terms of understanding  
11 either how CLOs worked or how the Investment Advisers Act  
12 worked. So I was -- it was almost more of a proofing.

13 MR. SBAITI: Your Honor, based upon that, I mean,  
14 he's helping a law firm perform its function for the client.  
15 That's an agency relationship that gets cloaked. You can call  
16 him a consulting expert. You can call him, to a certain  
17 extent, a fact witness, Your Honor. If we want to take a  
18 break, I'm sure we could find authority on that basis for a  
19 work product privilege pretty easily.

20 But he's an agent of the DAF. Even if it's an informal  
21 agency relationship, that's still agency. He's in some  
22 respects, I guess, an agent of the law firm, to the extent  
23 he's helping us perform our legal work. And it seems like  
24 invading that privilege at this juncture is (a) unnecessary,  
25 because we've already conceded that there's been

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1 conversations, which I think is the relationship they wanted  
2 to establish. And it's not unusual for a law firm to use  
3 someone with specialized knowledge to understand some of the  
4 intricacies of the actual issues that they're -- that they're  
5 getting ready to litigate.

6 THE COURT: Okay. I find no privilege. All right.  
7 That's the ruling.

8 MR. BRIDGES: Your Honor, may I add one thing to the  
9 objection for the record?

10 THE COURT: Okay, we have a rule, one lawyer per  
11 witness. Okay? So, thank you. A District Court rule, by the  
12 way, not mine.

13 MR. SBAITI: Your Honor, may we take a short recess,  
14 given the Court's ruling?

15 THE COURT: Well, I'd really like to finish this  
16 witness. How much longer do you have?

17 MR. MORRIS: About eight more questions.

18 THE COURT: All right. We'll take a break after the  
19 direct, okay?

20 MR. SBAITI: Your Honor, I would ask that we -- if  
21 he's going to ask him more questions about the content of the  
22 communications, I ask respectfully for a recess so we can  
23 figure out what to do about that. Because, right now, there's  
24 a ruling that he's going to have to reveal privileged  
25 information, and we don't have a way to go around and figure

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1 out how to resolve that issue if we needed to.

2 THE COURT: Okay. I've ruled it's not privilege.

3 Okay?

4 MR. SBAITI: I understand that, Your Honor, but --

5 THE COURT: Your client is CLO Holdco and the DAF.

6 MR. SBAITI: Yes, Your Honor.

7 THE COURT: Representative, Mark Patrick. No  
8 contract with Mr. Dondero. The fact that he may be very  
9 involved I don't think gives rise to a privilege. That's my  
10 ruling.

11 MR. SBAITI: I understand, Your Honor. I understand,  
12 Your Honor, but I'm asking for a recess so that we can at  
13 least undertake to provide Your Honor with some case law on a  
14 reconsideration before we go there, because that bell can't be  
15 rung.

16 MR. MORRIS: Your Honor, if I may?

17 MR. SBAITI: And it's --

18 THE COURT: Uh-huh.

19 MR. MORRIS: I'm happy to give them ten minutes, Your  
20 Honor, as long as they don't talk to the witness.

21 THE COURT: Okay.

22 MR. MORRIS: I want to give them the opportunity. Go  
23 right ahead.

24 THE COURT: All right. We'll take a ten-minute  
25 break.

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1 MR. SBAITI: Thank you.

2 THE COURT: It's 3:05.

3 THE CLERK: All rise.

4 (A recess ensued from 3:03 p.m. until 3:17 p.m.)

5 THE CLERK: All rise.

6 THE COURT: Okay. Please be seated. Going back on  
7 the record in Highland. Mr. Sbaiti?

8 MR. SBAITI: Yes, Your Honor. May I approach?

9 THE COURT: You may.

10 MR. SBAITI: Your Honor, we have some authority to  
11 support the position we'd taken. We'd ask the Court to  
12 reconsider your ruling on the privilege.

13 The first bit of authority is Section 70 of the  
14 Restatement (Third) of Law Governing Lawyers. Privileged  
15 persons within the meaning of Section 68, which governs the  
16 privilege, says that those persons include either agents of  
17 either the lawyer or the client who facilitate communications  
18 between the two in order for the lawyers to perform their  
19 function.

20 Another case that we found is 232 F.R.D. 103 from the  
21 Southern District of New York, 2005. It's *Express Imperial*  
22 *Bank of U.S. v. Asia Pulp Company*. And in that case, Your  
23 Honor, the consultant was a -- had a close working  
24 relationship with the company and performed a similar role to  
25 that of the employee and was assisting the law firm in

1 performing their functions, and the court there found that the  
2 work product privilege -- actually, the attorney-client  
3 privilege -- attached in what they called a Functional  
4 Equivalents Doctrine, Your Honor.

5 And here we have pretty much the same set of facts that's  
6 pretty much undisputed. The fact that there -- and the fact  
7 that there isn't a written agreement doesn't mean there isn't  
8 a contractual arrangement for him to have rendered services  
9 and advice. And the fact that he's, you know, recruited by us  
10 to help us perform our functions puts him in the realm, as I  
11 said, of something of a consulting expert.

12 Either way, the work product privilege, Your Honor, should  
13 apply, and we'd ask Your Honor not to invade that privilege at  
14 this point, Your Honor. And I'll ask you to reconsider your  
15 prior ruling.

16 Furthermore, I believe Mr. Morris, you know, in making his  
17 argument, is trying to create separation. The fact that he  
18 has no relationship, that the privilege can be invaded, seems  
19 to defeat the whole premise of his whole line of questioning.

20 So, once again, Your Honor, I just -- it's a tit for a tat  
21 there, and it seems to kind of eat itself. Either he is  
22 working with us, which we've admitted he is working with us,  
23 us being the law firm, and helping us do our jobs, or he's  
24 not. And if he's not, then this should be done.

25 THE COURT: Okay.

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1 MR. MORRIS: Your Honor, briefly?

2 THE COURT: Well, among other things, what do you  
3 want me to do? Take a break and read your one sentence from  
4 the Restatements and your one case? And could you not have  
5 anticipated this beforehand?

6 MR. SBAITI: Your Honor, --

7 THE COURT: This is not the way we work in the  
8 bankruptcy courts, okay? We're business courts. We have  
9 thousands of cases. We expect briefing ahead of time.

10 MR. SBAITI: Your Honor, this has been a rather  
11 rushed process anyway. And to be honest, --

12 THE COURT: When was the motion filed?

13 MR. SBAITI: Your Honor, --

14 THE COURT: More than a month ago.

15 MR. SBAITI: -- his deposition was a week ago.

16 THE COURT: Well, okay. So you could not have  
17 anticipated this issue until his deposition one week ago?

18 MR. SBAITI: Your Honor, this issue arose at the  
19 deposition, obviously, because that's what he's quoting from.  
20 However, at least to us, this is such a well-settled area, and  
21 to be honest, --

22 THE COURT: Such a well-settled area that you have  
23 one sentence from the Restatement and one case from the  
24 Southern District of New York?

25 MR. SBAITI: No, Your Honor. I think the work

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1 product privilege lexicon -- we had ten minutes to try to find  
2 something more on point than the general case law that applies  
3 the work product privilege to people that work with lawyers,  
4 consultants who work with lawyers, employees who work with  
5 lawyers, even low-down employees who normally wouldn't enjoy  
6 the privileges that attach to the corporation, when they work  
7 with the company for -- when they work with the company  
8 lawyers, it typically attaches.

9 THE COURT: You know, obviously, I know a few things  
10 about work product privilege, but he doesn't check any of the  
11 boxes you just listed out.

12 MR. SBAITI: I disagree, Your Honor.

13 THE COURT: He's not an employee. He's not a low-  
14 level employee.

15 MR. SBAITI: He's a consultant.

16 THE COURT: With no agreement.

17 MR. SBAITI: With a verbal agreement. He's an  
18 advisor. And he was recruited by us, and at the request of  
19 the DAF, of the head of the DAF, Mr. Patrick, to help us do  
20 our job for the DAF. I don't --

21 THE COURT: Okay. Mr. Morris, what do you want to  
22 say?

23 MR. MORRIS: Just briefly, Your Honor. This issue  
24 has been ripe since last Tuesday. They directed him not to  
25 answer a whole host of questions about his involvement at the

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1 deposition last Tuesday, so they've actually had six days to  
2 deal with this. That's number one.

3 Number two, there's absolutely nothing inconsistent with  
4 the Debtor's position that Mr. Dondero is participating in the  
5 pursuit of claims and at the same time saying that his  
6 communications with the Sbaiti firm are not privileged.  
7 There's nothing inconsistent about that.

8 So the argument that he just made, that somehow because  
9 we're trying to create separation, that that's inconsistent  
10 with our overall arching theme that Mr. Dondero is precisely  
11 engaged in the pursuit of claims against Mr. Seery, I think  
12 that takes care of that argument.

13 Finally, your Honor, with respect to this consultancy  
14 arrangement, not only isn't there anything in writing, but  
15 either you or Mr. Sbaiti or I, I think, should ask Mr. Dondero  
16 the terms of the agreement. Is he getting paid? Is he doing  
17 it for free? Who retained him? Was it Mr. -- because the --  
18 there's no such thing. There's no such thing.

19 The fact of the matter is what happened is akin to I have  
20 a slip-and-fall case and I go to a personal injury lawyer and  
21 I bring my brother with me because I trust my brother with  
22 everything. It's not privileged. Any time you bring in  
23 somebody who is not the attorney or the client, the privilege  
24 is broken. It's really quite simple. Unless there's a common  
25 interest. They can't assert that here. There is no common

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1 interest. So --

2 THE COURT: Okay. Mr. Sbaiti, I'll give you up to  
3 three more minutes to *voir dire* Mr. Dondero to try to  
4 establish some sort of agency relationship or other evidence  
5 that you think might be relevant.

6 VOIR DIRE, RESUMED

7 BY MR. SBAITI:

8 Q Mr. Dondero, when you provided information to the law  
9 firm, were you doing so under an agency relationship? Do you  
10 know what an agency relationship is?

11 A Generally. When you're working on the -- or why don't you  
12 tell me?

13 Q Tell me your understanding, so we can use --

14 A That you're working for the benefit or as a proxy for the  
15 other entity or the other firm or the other person.

16 Q Right. So you're working for the DAF?

17 A Yes.

18 Q Do you do work for the DAF?

19 A Yes. As I stated, I'm surprised there isn't -- when we  
20 reconstituted after leaving Highland, we put in shared  
21 services agreements in place and asset management agreements  
22 in place and tasked people with doing that for most of the  
23 entities. There might be still a few contracts that are being  
24 negotiated, but I thought most of them were in place.

25 So I would imagine that there'll be an asset management

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1 agreement with the DAF back to NexPoint sometime soon, so it

2 -- it's --

3 Q Let me ask you this question. When you were providing  
4 information to us and having conversations with us, were you  
5 doing that as an agent of the DAF, the way you described it,

6 --

7 A Yes.

8 Q -- on their behalf?

9 A Yes.

10 Q Were you also doing it to help us do our jobs for the DAF?

11 A Yes.

12 Q Did you respond to requests for information from myself?

13 A Yes.

14 Q Did you help coordinate other -- finding other witnesses  
15 or sources of information at my request?

16 A Yes.

17 Q Did you do so based upon any understanding that I was  
18 working on behalf of the DAF for that?

19 A Yes. I knew -- I knew you were working for the DAF. No  
20 one else, yeah.

21 Q And so -- and so did you provide any expertise or any in-  
22 depth understanding to myself in helping me prepare that  
23 complaint?

24 A I think so, but I give a lot of credit to your firm for  
25 researching things that I -- I knew reasonably well but then

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1 you guys researched in even more depth.

2 MR. MORRIS: I'd move to strike the answer as  
3 nonresponsive.

4 THE COURT: Sustained.

5 BY MR. SBAITI:

6 Q Let me ask the question again. When you were providing us  
7 information and expertise, were you doing so knowing you were  
8 working -- helping us work for the DAF?

9 A Yes.

10 Q Now, did you demand any compensation for that?

11 A No.

12 Q Do you require compensation necessarily to help the DAF?

13 A No.

14 Q Do you do other things for the DAF sometimes without  
15 compensation?

16 A Right. We do the right thing, whether we get paid for it  
17 or not. Yes.

18 Q Had you known that our communications were not necessarily  
19 part of an agency relationship with the DAF, as you understood  
20 it, that you were just some guy out on the street, would you  
21 have had the same conversations with us?

22 A (sighs)

23 Q Let me ask a better question. If I had come to you  
24 working for someone that wasn't the DAF, you didn't already  
25 have a relationship with, would you have given us the same

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1 help?

2 A I wouldn't have been involved if it was somebody else.

3 Q Is the reason you got involved because we were the lawyers  
4 for the DAF?

5 A Correct.

6 MR. MORRIS: Objection. It's just leading. This is  
7 all leading.

8 THE WITNESS: Correct.

9 THE COURT: Sustained.

10 MR. SBAITI: Can --

11 THE WITNESS: Yeah. Sorry.

12 BY MR. SBAITI:

13 Q Do you get -- do -- did you -- did you do work for the --  
14 did you provide the help for the DAF laboring under the  
15 understanding that there was an agreement?

16 MR. MORRIS: Objection; leading.

17 THE COURT: Sustained.

18 BY MR. SBAITI:

19 Q Earlier you testified you believed there was an agreement?

20 A I thought that was an agreement, and I thought there will  
21 be one shortly if there isn't one, yes.

22 Q Okay.

23 A And so we -- I've been operating in a bona fide way in the  
24 best interests of the DAF throughout -- assuming there was an  
25 agreement, but even if there wasn't a formal one, I would

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1 still be moving in the best interests of the DAF and helping  
2 your firm out or --

3 Q And you did that because you believed there was an  
4 agreement or soon would be?

5 A Yes.

6 MR. SBAITI: Your Honor, I mean, I believe we've  
7 established a dual role here, both as an agent of the DAF and  
8 as an agent of the law firm, Your Honor.

9 THE COURT: Okay. Just a minute. I'm looking at  
10 Texas authority on common interest privilege to see if there's  
11 anything that --

12 (Pause.)

13 THE COURT: All right. Again, it would have been  
14 very nice to get briefing ahead of time. I think this  
15 absolutely could have been anticipated.

16 I do not find the evidence supports any sort of protection  
17 of this testimony under work product privilege, common  
18 interest privilege. I just haven't been given authority or  
19 evidence that supports that conclusion. So the objections are  
20 overruled.

21 Mr. Morris, go ahead.

22 DIRECT EXAMINATION, RESUMED

23 BY MR. MORRIS:

24 Q Can you describe for the Court the substance of your  
25 communications with Mr. Sbaiti concerning the complaint?

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1 A As I've stated, directing him toward the Advisers Act and  
2 then largely in a proofing function regarding CLO nomenclature  
3 and some of the other fund nomenclature that sometimes gets  
4 chaotic in legal briefs.

5 Q Did you communicate in writing at any time with anybody at  
6 the Sbaiti firm regarding any of the matters that are the  
7 subject of the complaint?

8 A I can't remember anything in writing. Almost everything  
9 was verbal, on the phone.

10 Q You don't tend to write much, right?

11 A Periodically.

12 Q Did you communicate with Mr. Patrick? Did you communicate  
13 with anybody in the world in writing regarding the substance  
14 of anything having to do with the complaint?

15 MR. SBAITI: Objection, Your Honor. Argumentative.

16 THE COURT: Overruled.

17 THE WITNESS: I --

18 MR. SBAITI: Your Honor, may I just -- one  
19 housekeeping. Rather than raise the same objection, may we  
20 have a standing objection, just so we're not disruptive, as to  
21 the privilege, just for preservation purposes, on the content  
22 of these communications? Otherwise, I'll just make the same  
23 objections and we can go through it.

24 THE COURT: Well, disruptive as it may be, I think  
25 you need to object to every --

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1 MR. SBAITI: Okay.

2 THE COURT: -- question you think the privilege  
3 applies to.

4 MR. SBAITI: I will do so. Thank you, Your Honor.

5 Uh-huh.

6 BY MR. MORRIS:

7 Q Mr. Dondero, the question was whether you've ever  
8 communicated with anybody in the world in writing concerning  
9 anything having to do with the complaint?

10 A Not that I remember.

11 Q Okay.

12 MR. MORRIS: I will point out, Your Honor, that last  
13 week, when the privilege was asserted, I had requested the  
14 production of a privilege log. I was told -- I forgot exactly  
15 what I was told, but we never received one. I'll just point  
16 that out as well.

17 THE COURT: Okay.

18 BY MR. MORRIS:

19 Q You provided comments to the drafts of the complaint  
20 before it was filed, correct?

21 A Yes, a few.

22 Q Can you describe for the Court all of the comments that  
23 you provided to earlier drafts of the complaint?

24 MR. SBAITI: Your Honor, we object on the basis of  
25 privilege and work product and joint -- joint interest

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1 privilege.

2 THE COURT: Overruled.

3 THE WITNESS: It's along the lines of things I've  
4 said in this court several times. The obligations under the  
5 Advisers Act cannot be negotiated away and they cannot be  
6 waived by the people involved, full stop. I remember giving  
7 the -- Mazin the example of the only reason why we're in a  
8 bankruptcy is from an arbitration award that, even though we  
9 did what was in the best interests of the investors, we got  
10 the investors out more than whole over an extended period of  
11 time, they got an arbitration award that said when we  
12 purchased some of the secondary interests we should have  
13 offered them up to the other 800 members in the committee  
14 besides the -- the 800 investors in the fund besides the eight  
15 people on the committee who had approved it and that the  
16 committee couldn't approve a settlement that went against the  
17 Advisers Act and the Advisers Act stipulates specifically that  
18 you have to offer it up to other investors before you take an  
19 opportunity for yourself. And someday, hell or high water, in  
20 this court or some other, we will get justice on that. And  
21 that was the primary point that I reminded Mazin about.

22 BY MR. MORRIS:

23 Q And that's exactly the conversation you had with Mark  
24 Patrick that started this whole thing, correct?

25 A No.

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1 Q You told Mark Patrick that you believe the Debtor had  
2 usurped a corporate opportunity that should have gone to the  
3 DAF, didn't you?

4 A That was not our conversation.

5 Q So when Mr. Patrick testified to that earlier today, he  
6 just got it wrong, right?

7 A Well, maybe later on, but it wasn't that in the beginning.  
8 The beginning, any conversation I had with Mark Patrick in the  
9 beginning was smelling a rat in the way that the Debtor had  
10 priced the portfolio for HarbourVest.

11 Q Hmm. So you're the one, again, who started that piece of  
12 the discussion as well, correct?

13 A Started the -- I -- I guess I smelled a rat, but I put the  
14 person who could do all the numbers in touch with the Sbaiti  
15 firm.

16 Q And was the rat Mr. Seery?

17 A Was the rat Mr. Seery? Or the independent board. Or a  
18 combination thereof. I believe the independent board knew  
19 exactly what Seery was doing with --

20 Q Do you have any idea --

21 A -- HarbourVest.

22 Q Do you have any idea why, why the Sbaiti firm didn't name  
23 the whole independent board in the -- in the motion for leave  
24 to amend?

25 A I don't know. Maybe they will at some point.

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1 Q Yeah.

2 A I don't know.

3 Q But did you tell the Sbaiti firm that you thought the  
4 whole independent board was acting in bad faith and was a rat?

5 MR. SBAITI: Your Honor, I object on the basis of  
6 privilege.

7 THE COURT: Overruled.

8 MR. SBAITI: All three.

9 THE WITNESS: I knew Jim Seery was and I knew Jim  
10 Seery had weekly meetings with the other independent board  
11 members, so the HarbourVest settlement was significant enough  
12 that it would have been approved, but I don't have direct  
13 knowledge of their involvement.

14 BY MR. MORRIS:

15 Q And so you -- but you believed Jim Seery was certainly a  
16 rat, right?

17 A Oh, I -- there was a defrauding of third-party investors  
18 to the tune of not insignificant 30, 40, 50 million bucks, and  
19 it was obfuscated, it was -- it was highly obfuscated in the  
20 9019.

21 Q Did you think Mr. Seery was a rat, sir? Yes or no?

22 A I believe he had monthly financials. He knew that the  
23 numbers presented in the 9019 were wrong. And if that makes  
24 him a rat, that makes him a rat. Or maybe he's just being  
25 aggressive for the benefit of his incentive or for the estate.

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1 But I -- I believe those things wholeheartedly.

2 Q Did you tell the Sbaiti firm you thought Jim Seery was a  
3 rat?

4 MR. SBAITI: Objection, Your Honor. Privilege.

5 THE COURT: Overruled.

6 THE WITNESS: I -- I don't remember using those  
7 words.

8 BY MR. MORRIS:

9 Q Did you tell the Sbaiti Firm that you thought Jim Seery  
10 had engaged in wrongful conduct?

11 MR. SBAITI: Your Honor, objection. Privilege.

12 THE COURT: Overruled.

13 THE WITNESS: I believe he violated the Advisers Act,  
14 and I was clear on that throughout.

15 BY MR. MORRIS:

16 Q Listen carefully to my question. Did you tell the Sbaiti  
17 firm that you believed that Jim Seery engaged in wrongful  
18 conduct?

19 MR. SBAITI: Objection, Your Honor. Calls for  
20 privileged communications.

21 THE COURT: Overruled.

22 THE WITNESS: I think I gave the answer. I'll give  
23 the same answer. I believe he violated the Advisers Act.

24 BY MR. MORRIS:

25 Q What other wrongful conduct did you tell the Sbaiti firm

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1 you thought Mr. Seery had engaged in?

2 MR. SBAITI: Same objection, Your Honor.

3 THE COURT: Overruled.

4 MR. SBAITI: Calls for privileged communications.

5 THE COURT: Overruled.

6 THE WITNESS: I -- I just remember the obfuscating  
7 and mispricing portfolio violations of the Advisers Act was  
8 all I discussed with the Sbaiti firm regarding Seery's  
9 behavior.

10 BY MR. MORRIS:

11 Q Did you talk to them about coming to this Court under the  
12 gatekeeper order to see if you could get permission to sue Mr.  
13 Seery?

14 A I --

15 MR. SBAITI: Objection, Your Honor. Calls for  
16 privileged communication.

17 THE COURT: Overruled.

18 THE WITNESS: I wasn't involved in any of the --

19 BY MR. MORRIS:

20 Q Did you --

21 A -- tactical stuff on who to sell or -- who to sue or when  
22 or whatever.

23 Q Did you tell the Sbaiti firm that you thought they should  
24 sue Mr. Seery?

25 MR. SBAITI: Objection, Your Honor. Calls for

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1 privileged communication.

2 THE COURT: Overruled.

3 MR. SBAITI: I'll also say, Your Honor, the question  
4 is getting a little argumentative.

5 THE WITNESS: I didn't get directly --

6 THE COURT: Overruled.

7 THE WITNESS: I didn't get directly involved in who  
8 was -- who was specifically liable.

9 BY MR. MORRIS:

10 Q How many times did you speak with the Sbaiti firm  
11 concerning the complaint?

12 A Half a dozen times, maybe.

13 Q Did you ever meet with them in person?

14 A I've only met with them in person a couple, three times.  
15 And I don't think any of them -- no, it was, excuse me, it was  
16 on deposition or other stuff. It wasn't regarding this.

17 Q Did you send them any information that was related to the  
18 complaint?

19 A I did not.

20 Q Did you ask anybody to send the Sbaiti firm information  
21 that related to the complaint?

22 A I did not. I -- I was aware that Hunter Covitz was  
23 providing the historic detailed knowledge to the firm, but it  
24 -- it wasn't -- I don't believe it was me who orchestrated  
25 that.

Dondero - Direct

208

1 Q Did you talk to anybody at Skyview about the allegations  
2 that are contained in the complaint before it was filed?

3 A I don't -- I don't remember.

4 Q Have you ever talked to Isaac Leventon or Scott Ellington  
5 about the allegations in the complaint?

6 A No. They weren't involved.

7 Q How about -- how about D.C. Sauter? You ever speak to him  
8 about it?

9 A I don't --

10 MR. TAYLOR: Objection, Your Honor.

11 THE WITNESS: I don't remember.

12 MR. TAYLOR: At this point, D.C. Sauter is indeed an  
13 employee of Skybridge and is a general counsel for some of the  
14 entities which he worked for. And to the extent he's trying  
15 to ask for those communications, that would be invasion of the  
16 privilege.

17 MR. MORRIS: I'll withdraw it, Your Honor. That's  
18 fair.

19 THE COURT: Okay

20 MR. MORRIS: That's fair.

21 THE COURT: Question withdrawn.

22 THE WITNESS: I thought you only had eight more  
23 questions.

24 MR. MORRIS: Opened the door.

25 BY MR. MORRIS:

Dondero - Direct

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1 Q Can you describe the general fact -- withdrawn. You  
2 provided facts and ideas to the Sbaiti firm in connection with  
3 your review of the draft complaint, correct?

4 A Ideas and proofreading.

5 Q Anything beyond what you haven't described already?

6 A Nope.

7 Q Okay. Who is your primary contact at the Sbaiti firm, if  
8 you had one?

9 A Mazin.

10 Q Okay. Did you suggest to Mr. Sbaiti that Mr. Seery should  
11 be named as a defendant in the lawsuit before it was filed?

12 MR. SBAITI: Your Honor, calls for privileged  
13 communication. We object --

14 THE COURT: Overruled.

15 MR. SBAITI: -- to that answer.

16 MR. SBAITI: Okay.

17 THE WITNESS: Again, no. I wasn't involved with the  
18 tactics on who would be defendants and when or if other people  
19 would be added.

20 BY MR. MORRIS:

21 Q Did you -- are familiar with the motion to amend that was  
22 filed by the Sbaiti firm?

23 A I'm more familiar with it after today --

24 Q Right.

25 A -- than I was before.

Dondero - Direct

210

1 Q And were you aware that that motion was going to be filed  
2 prior to the time that it actually was filed?

3 A I -- I don't remember. Probably.

4 Q And who would have been the source of that information?  
5 Would that have been Mr. Sbaiti?

6 A Yes.

7 Q Okay. And did you express any support for the decision to  
8 file the motion for leave to amend in the District Court?

9 A I -- I wasn't involved. It was very complicated legal  
10 preservation conver... -- I wasn't involved. I knew the  
11 conversations were going on between different lawyers, but I  
12 wasn't involved in the ultimate decision. I didn't encourage,  
13 applaud, or even know exactly what court it was going to be  
14 filed in.

15 MR. MORRIS: All right. I have no further questions,  
16 Your Honor.

17 THE COURT: All right. Pass the witness.

18 MR.

19 ANDERSON: We have no questions, Your Honor.

20 THE COURT: Okay. Any questions from Respondents?

21 MR. SBAITI: No questions.

22 THE COURT: Okay. Mr. Taylor?

23 CROSS-EXAMINATION

24 BY MR. TAYLOR:

25 Q Mr. Dondero, --

Dondero - Cross

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1 A Yes, sir.

2 Q -- you are not the authorized representative of CLO  
3 Holdco, are you?

4 A No.

5 Q You're not the authorized representative for the DAF, are  
6 you?

7 A No.

8 Q Do you know who that person is as we sit here today?

9 A Yes.

10 Q Who is that?

11 A Mark Patrick.

12 Q Thank you.

13 MR. TAYLOR: No further questions.

14 THE COURT: Any redirect on that cross?

15 MR. MORRIS: I do not, Your Honor. I would just like  
16 to finish up the Debtor's case in chief by moving my exhibits  
17 into evidence.

18 THE COURT: Okay. Mr. Dondero, you're excused.

19 (The witness steps down.)

20 THE COURT: All right. So you have no more  
21 witnesses; you're just going to offer exhibits?

22 MR. MORRIS: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. MORRIS: So, at Docket #2410, --

25 THE COURT: Uh-huh.

1 MR. MORRIS: -- the Court will find Exhibits 1  
2 through 53.

3 THE COURT: Uh-huh.

4 MR. MORRIS: In advance, Your Honor, I've conferred  
5 with the Respondents' counsel. They had previously objected  
6 to Exhibits 15 and 16, which I believe were the Grant Scott  
7 deposition transcripts. They objected to them on the grounds  
8 of lack of completeness because I had taken the time to make  
9 deposition designations, but I'm happy to put the entirety of  
10 both transcripts into evidence, and I hope that that will  
11 remove the objections to Exhibits 15 and 16.

12 THE COURT: All right. Before we confirm, let's just  
13 make sure we have the right one.

14 MR. MORRIS: Oh, I apologize.

15 THE COURT: I have 16 as the July order.

16 MR. MORRIS: I apologize. You're absolutely right,  
17 Your Honor. What I was referring to was -- oh, goodness. One  
18 second. (Pause.) I was referring to Exhibits 23 and 24.  
19 Those are Mr. Scott's deposition designations. They had  
20 lodged an informal objection with me on grounds of  
21 completeness. And in order to resolve that objection, we're  
22 happy to put the entirety of both transcripts in.

23 THE COURT: All right. So if our Respondents could  
24 confirm with the agreement to put in the entire depos at 23  
25 and 24, you stipulate to 1 through 53?

1 MR. PHILLIPS: We also -- Your Honor, --

2 MR. MORRIS: Yeah, I was going to take them one at a  
3 time. Just take those two.

4 MR. PHILLIPS: Yeah, can we just take those two?  
5 Confirmed?

6 MR. MORRIS: Okay.

7 THE COURT: Oh, okay.

8 MR. PHILLIPS: Because there are other -- there are  
9 other -- we exchanged objections to each other's witness and  
10 exhibit lists. And so I think you can handle the rest of them  
11 kind of in a bunch, right?

12 MR. MORRIS: Yeah. Yeah, there's two bunches,  
13 actually.

14 MR. PHILLIPS: Yeah.

15 THE COURT: Okay. So you have just now stipulated to  
16 23 and 24 being admitted --

17 MR. MORRIS: Correct.

18 THE COURT: -- with the full depos? Okay.

19 MR. PHILLIPS: Yes, ma'am. Thank you.

20 THE COURT: All right.

21 (Debtor's Exhibits 23 and 24 are received into evidence.)

22 MR. MORRIS: And then the next two that they objected  
23 to are Exhibits 15 and 16. 15 is the January order and 16 is  
24 the July order. They objected on relevance grounds. I think  
25 16 -- these are the two orders that the Debtors contend the

1 Respondents have violated, so I don't understand the relevance  
2 objection, but that's what it was and that's my response.

3 MR. PHILLIPS: Resolved, Your Honor.

4 THE COURT: Okay. 15 and 16 are admitted.

5 (Debtor's Exhibits 15 and 16 are received into evidence.)

6 MR. MORRIS: Okay. And then the last objection  
7 relates to a group of exhibits. They're Exhibits 1 through  
8 11. Those exhibits I think either come in together or stay  
9 out together. They are exhibits that relate to the  
10 HarbourVest proceedings, including deposition notices,  
11 including I think the transcript from the hearing, the Court's  
12 order, the motion that was filed.

13 The Debtor believes that those documents are relevant  
14 because they go right to the issue of the gatekeeper order and  
15 had they filed, had the Respondents followed the gatekeeper  
16 order, this is -- this is why they didn't do it. You know  
17 what I mean? That's the argument, is that the Respondents,  
18 one of the reasons the Respondents -- argument -- one of the  
19 reasons the Respondents didn't come to this Court is because  
20 they knew this Court had that kind of record before it. And I  
21 think that's very relevant.

22 THE COURT: All right. Response?

23 MR. PHILLIPS: Your Honor, we think that these  
24 exhibits are not relevant. We have a very focused, we think,  
25 -- we have the Court's order. Those objections are withdrawn.

1 We have the complaint. We have the motion to amend. And the  
2 issue is whether the motion to amend, which was dismissed one  
3 day, or the next day after it was filed, constitutes criminal  
4 -- constitutes contempt.

5 So we think the prior proceedings go to their underlying  
6 argument, which is the lawsuit or the complaint is no good,  
7 and that has nothing to do with -- there's been no foundation  
8 laid and it's not relevant what happened in connection with  
9 the HarbourVest settlement. It is what it is, and there's no  
10 dispute that it is what it is, but it's not relevant to  
11 establish any type of -- they've even said intent is not even  
12 relevant here. So we -- that's -- we think all of that goes  
13 out and simplifies the record, because it has nothing to do  
14 with whether or not there was a contempt.

15 THE COURT: Response?

16 MR. MORRIS: We withdraw the exhibits, Your Honor.  
17 I'm just going to make it simple for the Court.

18 THE COURT: Okay.

19 MR. MORRIS: I'm just going to make it simple for the  
20 Court.

21 THE COURT: 1 through 11 are withdrawn.

22 (Debtor's Exhibits 1 through 11 are withdrawn.)

23 MR. MORRIS: So, the balance, there was no objection.  
24 So all of the Debtor's exhibits on Docket #2410 -- let me  
25 restate that. Exhibits 12 through 53 no longer have an

1 objection. Is that correct?

2 MR. PHILLIPS: Yes.

3 MR. MORRIS: Okay. And then --

4 MR. PHILLIPS: Confirmed.

5 THE COURT: Okay.

6 (Debtor's Exhibits 12 through 53 are received into  
7 evidence.)

8 MR. MORRIS: Okay. Thank you. And then we filed an  
9 amended list, I believe, yesterday --

10 THE COURT: Uh-huh.

11 MR. MORRIS: -- to add Exhibits 40 -- 54 and 55.

12 THE COURT: Uh-huh.

13 MR. MORRIS: And those exhibits are simply my firm's  
14 billing records.

15 THE COURT: Okay.

16 MR. MORRIS: You know, we added Mr. Demo to the  
17 witness list in case there was a need to establish a  
18 foundation. That's the only thing he would testify to. I  
19 don't know if there's an objection to those two exhibits,  
20 because we hadn't had an opportunity to confer.

21 THE COURT: Any objection?

22 MR. PHILLIPS: Your Honor, we're not going to require  
23 authenticity and foundation for -- we have the right, we  
24 think, to say that they're not a ground -- we're not going to  
25 challenge that they are the bills, and the bills say what they

1 say. We don't need Mr. -- we don't need a witness to  
2 authenticate those exhibits. But we reserve all substantive  
3 rights with respect to the effect of those exhibits.

4 THE COURT: All right. 54 and 55 are admitted.

5 (Debtor's Exhibits 54 and 55 are received into evidence.)

6 MR. MORRIS: And with that, Your Honor, the Debtor  
7 rests.

8 THE COURT: Okay. All right. Respondents?

9 (Counsel confer.)

10 MR. PHILLIPS: If I could have a second?

11 THE COURT: Okay.

12 A VOICE: Sorry, Your Honor.

13 (Pause.)

14 MR. PHILLIPS: Your Honor, we have filed in our  
15 witness and exhibit list, and I have to say I don't have the  
16 number, but we'll get the docket entry number, but we have 44  
17 exhibits. There's an objection to Exhibit #2, which is --  
18 thank you -- it's Document 2411, Your Honor. Thank you.

19 THE COURT: Uh-huh.

20 MR. PHILLIPS: There is a pending objection to  
21 Exhibit #2 which we have not resolved. There's no objection  
22 to any other exhibit. But in reviewing our exhibit list, I  
23 found that we had some -- some mistakes and duplications.

24 So, with respect to 2411, we would withdraw Exhibit 13,  
25 14, and 29, and we would offer Exhibit 1, and then 30 through

1 44, with 13, 14, and 29 deleted.

2 THE COURT: Okay. So 1, 3 through 12, --

3 MR. PHILLIPS: Yes.

4 THE COURT: -- 15 through 28, and then 30 --

5 MR. PHILLIPS: And then 30 through 44.

6 THE COURT: -- through 44? Do you confirm, Mr.

7 Morris?

8 MR. MORRIS: Yes, Your Honor. The only objection we  
9 have is to Exhibit #2.

10 THE COURT: And that's -- he's not offering that?

11 MR. MORRIS: Yeah.

12 MR. PHILLIPS: Not at this time, Your Honor.

13 THE COURT: Okay.

14 MR. PHILLIPS: We would have to have testimony about  
15 that.

16 THE COURT: Okay. All right. So those are admitted.

17 MR. PHILLIPS: Okay.

18 (Mark Patrick's Exhibits 1, 3 through 12, 15 through 28,  
19 and 30 through 44 are received into evidence.)

20 THE COURT: By the way, it looks like Exhibit 44 is  
21 at a different docket number, Docket 2420. Correct? You have  
22 --

23 MR. SBAITI: Your Honor, I believe Exhibit 44 is the  
24 hearing transcript from the July approval hearing. At least  
25 that's what it's supposed to be.

1 THE COURT: Okay.

2 MR. SBAITI: It was Exhibit 2 on the Debtor's list,  
3 and then I think they took it off, so we had to add it.

4 MR. PHILLIPS: Oh, okay. I was looking -- oh, that's  
5 right. They -- that's correct, Your Honor.

6 THE COURT: Okay.

7 MR. PHILLIPS: Exhibit 44 was added --

8 THE COURT: Okay.

9 MR. PHILLIPS: -- because the Debtor's withdrew it,  
10 and so it was added in the second -- in the supplemental and  
11 amended list. The -- the one that I was talking about was the  
12 prior list.

13 THE COURT: Okay. So that's at Docket 2420?

14 MR. PHILLIPS: Yes.

15 THE COURT: You're not offering 45 or 46?

16 MR. PHILLIPS: No, I think we'd offer 45 and 46 as  
17 well. I'm sorry.

18 THE COURT: Okay. Any objections, Mr. Morris?

19 MR. MORRIS: No, Your Honor.

20 THE COURT: Okay. So 45 and 46 are admitted as well.  
21 They're at Docket Entry 2420.

22 (Mark Patrick's Exhibits 45 and 46 are received into  
23 evidence.)

24 THE COURT: All right. Your witnesses?

25 MR. PHILLIPS: Your Honor, could we have five minutes

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1 to just see what we're -- our plan is, and then we'll be back  
2 at 4:00?

3 THE COURT: Okay. We'll be back at 4:00.

4 MR. PHILLIPS: Thank you.

5 THE CLERK: All rise.

6 (A recess ensued from 3:55 p.m. until 4:04 p.m.)

7 THE CLERK: All rise.

8 THE COURT: Please be seated. All right. Back on  
9 the record in Highland. Mr. Phillips?

10 MR. PHILLIPS: Your Honor, with the introduction of  
11 the Respondents -- CLO Holdco, DAF Fund, LP, and Mark Patrick,  
12 those Respondents, and we consider Mark Patrick a Respondent  
13 although not formally named as a Respondent because he is the  
14 party who authorized the filing of the Seery motion -- we  
15 rest.

16 THE COURT: You rest? Okay. Well, Mr. Morris,  
17 closing arguments?

18 MR. MORRIS: How much time do I have?

19 THE COURT: You've got a lot more time than you  
20 probably thought you were going to. You're under an hour.

21 MR. MORRIS: 42 minutes?

22 THE COURT: How much?

23 THE CLERK: 42 minutes.

24 THE COURT: 42 minutes? Feel free not to use it all.

25 MR. SBAITI: Out of curiosity, how long do we have?

1           THE COURT: You have a lot of time, which I hope you  
2 won't use.

3           THE CLERK: Hour and twenty-five minutes or so.

4           MR. SBAITI: I was afraid it was going to be an hour  
5 and twenty, so --

6           MR. PHILLIPS: No, not either.

7           MR. MORRIS: I don't suspect I'll use all the time.

8           THE COURT: Okay. Thank you.

9           MR. MORRIS: May I proceed?

10          THE COURT: You may.

11           CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

12          MR. MORRIS: Good afternoon, Your Honor. John  
13 Morris; Pachulski Stang Ziehl & Jones; for the Debtor. I'd  
14 like to just make some closing remarks after the evidence has  
15 closed.

16          This is a very, very important motion, Your Honor. I take  
17 this stuff seriously. It's only the second contempt motion  
18 I've ever brought in my life. I've never gone after another  
19 law firm. But these facts and circumstances require it,  
20 because my client is under attack, and these orders were  
21 entered to prevent that.

22          It is serious stuff. There's no question in my mind,  
23 there's no question the evidence showed, clear and  
24 convincingly, beyond reasonable doubt, that they violated this  
25 Court's order.

1       I started off with three very simple prongs. So simple  
2 you'd think I'd remember them. Number one, was a court order  
3 in effect? There is no dispute. The court order was in  
4 effect.

5       Number two, did the order require certain conduct by the  
6 Respondent? We believe it did. We heard an hour-long  
7 argument styled as an opening statement, but it was really  
8 argument and not an opening statement, about all the defects  
9 in the order. But the one thing that is crystal clear in the  
10 order are the words commence or pursue. You've been told many  
11 times by the Respondent that nobody has commenced an action  
12 against Mr. Seery. That is true. We all know what the word  
13 commence means. We all know what the word pursue means.

14       I heard argument this morning that pursue means after a  
15 claim is filed you pursue a case. That's the way lawyers talk  
16 about it. But that doesn't make any sense, Your Honor,  
17 because once you've commenced the action you've violated the  
18 order. It's commence or pursue, it's in the disjunctive, and  
19 you can't read out of the order the concept of pursuit by  
20 making it an event that happens after the commencement,  
21 because that's exactly what they're trying to do. They're  
22 trying to read out of the order the word pursuit.

23       And I ask you to use very simple common sense. If filing  
24 a motion for leave to amend a complaint to add Mr. Seery as a  
25 defendant is not pursuit, what is? What is? There's nothing

1 left. You commence an action or you do something less than  
2 commencing an action when you're going after the man. That's  
3 what pursuit means. They're going after the man. And they  
4 asked the District Court to do what they knew they couldn't.

5 Mr. Phillips is exactly right. I made the point about  
6 Rule 15 because they knew they couldn't do it. I'm not  
7 suggesting that they should have. I'm suggesting that the  
8 reason that they didn't is because they knew they were -- they  
9 were in a bad place. Because if they really just wanted to  
10 name Mr. Seery as a defendant, they wouldn't have done it.  
11 They knew commence was crystal clear.

12 What they're trying to do is claim that somehow there's an  
13 ambiguity around the word pursuit. Does that make any sense  
14 at all? Filing a motion for leave to amend the complaint.  
15 And Mr. Patrick, to his credit, candidly admitted that if the  
16 motion was granted, they were suing, yeah, as long -- as long  
17 as the Sbaiti firm, you know, recommended it. That's what  
18 would have happened.

19 Those orders that you signed, nothing, absolutely  
20 meaningless from their point of view. They believed they were  
21 wrong. They believed that they were overbroad. They believed  
22 they were too narrow. They believed they were vague. They  
23 believed they were without authority. They don't get to be  
24 the gatekeeper. They want to be the gate -- that's this  
25 Court's decision. That's why we went through all of the

1 processes that we did. And they just flagrantly said, I don't  
2 agree. I don't agree because it's wrong this way and it's  
3 wrong that way and it's wrong the other way, and therefore let  
4 me go find a higher authority to validate my thinking. That's  
5 not the way this process is supposed to work.

6 The independent directors and Mr. Seery relied on the  
7 gatekeeper in accepting their positions. It was a quid pro  
8 quo. Mr. Dondero agreed to the exact same provision, the  
9 exact same gatekeeper provision in the January order that he  
10 now complains about today, that the DAF complains about today.  
11 Where were these people?

12 As the Court knows, nobody appealed either order. The  
13 Debtor, the independent board, Mr. Seery expected that the  
14 plain and unambiguous words would be honored and enforced. I  
15 think that's fair. I think that's the way the process is  
16 supposed to work.

17 Instead, we have games. We have these linguistic  
18 gymnastics. We have statements that are too cute by half.  
19 Mr. Dondero won't even admit that he appointed Mr. Scott back  
20 in 2012. I couldn't even get him to do that, really, even  
21 though the documents say it, even though Mr. Patrick says it.

22 I'll take the Respondents one at a time in a moment, but I  
23 just want to deal with some of the more interesting arguments  
24 they make. The order was vague because it didn't say you  
25 can't seek leave from the District Court to amend your

1 complaint to add Mr. Seery. They said that that's what makes  
2 the order vague.

3 Your Honor, if you had thought to put that language in,  
4 you know what they would have done? They would have sued Mr.  
5 Seery in New York State Supreme Court, where he lives, and  
6 said, the order didn't say I couldn't do that. Where does it  
7 end?

8 There's a reason why the order was crafted broadly to say  
9 no commencement or pursuit without Bankruptcy Court approval.  
10 You have to bring a colorable claim.

11 We heard an argument this morning that they couldn't  
12 possibly have brought that motion for reconsideration first.  
13 You know, the one they filed about eight hours after we filed  
14 the contempt motion. They couldn't possibly have brought that  
15 motion before the motion for leave to amend because somehow  
16 they would have been estopped or they would have been found to  
17 have waived some right.

18 How could it be that anybody reasonably believes that  
19 complying with a court order results in a waiver of some  
20 right? It just -- these are games. These are not good  
21 arguments. And they certainly don't carry the day on a  
22 contempt motion.

23 We've heard repeatedly, the District Court denied the  
24 motion without prejudice, how have you been harmed? They  
25 shouldn't be able to rely on the District Court's prudence to

1 protect themselves. The question shouldn't be, have you been  
2 harmed since the District Court didn't grant the motion? No.  
3 The question should be, were we harmed by the attempt to name  
4 Mr. Seery a defendant, in violation of court orders, without  
5 notice? Without notice.

6 I'm told they assumed that I'd be checking the dockets. I  
7 wasn't checking the docket, Your Honor. I hadn't filed an  
8 appearance in the case. And, in fact, if you look at the  
9 exhibits, because I could pull it out, but we put in the  
10 communications between the lawyers. The last communication  
11 was from Mr. Pomerantz, and the last communication from Mr.  
12 Pomerantz said, Don't do it or we're going to file a motion  
13 for contempt. That's now in the evidence.

14 So, having sent that message, I wasn't going to check the  
15 docket to see if they really were going to go ahead and do it.  
16 I didn't think they would. And if they did, I certainly  
17 thought I'd get notice of it. Nothing.

18 And, again, I don't really need to establish intent at all  
19 in order to meet my burden of clear and convincing evidence of  
20 a contempt of court, but I think it is relevant when the Court  
21 hopefully finds liability and is considering damages, because  
22 that's really the most important point I have to make right  
23 now, is the Court needs to enforce its own orders, because if  
24 the Court doesn't, or doesn't impose a penalty that's  
25 meaningful, this is just going to continue. And Your Honor,

1 it's all in the record. Your Honor knows this. Mr. Daugherty  
2 has gone through it. Right? Mr. Terry went through it. UBS  
3 went through it. You've seen litigation now for a year and a  
4 half. It's happening in New York, right, the Sbaiti firm is  
5 reopening the Acis case. we've got this other lawsuit that's  
6 filed by an entity with like a five-tenths of one percent  
7 interest who's complaining about the SSP transaction that Mr.  
8 -- that the Debtor engaged in. There's no end here.

9 We need the Court to pump the brakes. We need the Court  
10 to exercise its authority. We need the Court to protect the  
11 estate fiduciary that it approved.

12 It is true, Mr. Seery is not a trustee. But it is also  
13 true that he is a third-party outsider who came into this case  
14 with the expectation and the promise in an order that he  
15 wouldn't be subjected to frivolous litigation, that this Court  
16 would be the arbiter of whether claims could be pursued  
17 against him. That was the code of conduct. That was the quid  
18 pro quo. That was the deal that Mr. Seery made. It's the  
19 deal that the board members made.

20 What gives these people the right to just say, your order  
21 is wrong, and because I think your order is wrong I'm going to  
22 go to the District Court, and if the District Court agrees,  
23 too bad, and if the District Court doesn't agree, we'll be  
24 back before Your Honor, and no harm, no foul? No. It can't  
25 be. It can't be that that's the way this process works. It

1 just can't.

2 So, Your Honor, let me take the Defendants one at a time,  
3 the Respondents one at a time. CLO Holdco and the DAF are  
4 corporate entities. They've done what they've done. Mr.  
5 Patrick, bless him, I think he's a lovely man. I don't think  
6 he quite bargained for what he's getting right now, but  
7 nevertheless he is where he is and he's willing to stand up  
8 and be counted, and for that, at least, I admire his courage.  
9 He's willing to say, I authorized those. But you know what?  
10 It's a violation of the law, it's a violation of this Court's  
11 order to file that motion, and so he has -- and he was very  
12 candid today. He knew of the order. Right? He knew it was  
13 in effect. He pointed out that it was in their papers.  
14 Right?

15 They're trying to be cute, they're trying to thread this  
16 needle, but it has no hole in it. They keep -- they keep  
17 doing this. Well, maybe if we do it this way, maybe if we do  
18 it -- no. The order was crystal clear.

19 The Sbaiti firm. They're probably fathers and husbands  
20 and good people and I wish them no ill will, but this is  
21 wrong. This is wrong. To come into a court you've never been  
22 in before and in less than twelve days to jump the shark like  
23 this in twelve -- in less than twelve days, because Mr.  
24 Patrick said they weren't hired until April, and the complaint  
25 was filed on the 12th.

1       We're told that they understood this was an overwhelming  
2 case with two -- why don't you take your time? What was the  
3 rush? Why not wait until the Defendant -- the Debtor appeared  
4 in the action before rushing to do this?

5       It's bad conduct, Your Honor, and that's really a very  
6 important point that I have to make, is that there's lots of  
7 lawyers who are engaging in highly-questionable conduct here  
8 that, from my perspective, goes well beyond the bounds of  
9 zealous advocacy.

10       It's not aggressive lawyering. I love aggressive  
11 lawyering. I really do. Respectful, honest -- and I don't,  
12 you know, I don't want to say that they're dishonest people.  
13 I don't mean to do that. But I think, I think they made a  
14 gross error in judgment, and there's no question that they  
15 violated this Court's order.

16       And then that leaves Mr. Dondero. I don't even know what  
17 to say about his testimony, Your Honor. He pursued claims  
18 against Mr. Seery. He thinks he's a rat. He's the one who  
19 started the whole process. He's the one who put the bug in  
20 Mark Patrick's ear. All of this is uncontested. Right?  
21 Uncontested.

22       I don't have to go back in time. We can talk about what  
23 happened to Grant Scott. It's a very sad story. Mr. Scott, I  
24 think, did his honest best to do what he believed, on the  
25 advice of counsel, was in the best interest of the DAF. And

1 Mr. Dondero, as you hear time and time again when he speaks  
2 about Mr. Seery, it was inappropriate. He's the arbiter of  
3 what's in the best interest of entities that other people  
4 control. And they pay a price. And they pay a price. And so  
5 Mr. Dondero felt it was his job, even though he tries to  
6 distance himself from the DAF -- I have no responsibility, I  
7 don't -- I'm not involved -- until, until somebody wants to  
8 sue Seery and the Debtor. Then he'll go all in on that, no  
9 matter how specious the claim may be.

10 The Debtor's not going to fold its tent because a motion  
11 for leave to amend was denied without prejudice. That's not  
12 the point. The point is that people need to respect this  
13 Court, people need to respect the Court's orders, and those  
14 that aid and abet or otherwise support the violation of court  
15 orders ought to be held to account, Your Honor.

16 I have nothing further.

17 THE COURT: All right. Thank you. Respondents?

18 CLOSING ARGUMENT ON BEHALF OF THE RESPONDENTS

19 MR. SBAITI: Your Honor, the fact that we're here on  
20 a motion for leave, and the motion for leave is what they're  
21 saying is pursuing a claim under the Court's order, and then  
22 you hear that the mere act of investigating a claim against  
23 Mr. Seery is also pursuing a claim, this goes to the infinite  
24 regression problem with this word pursue the way they want to  
25 construe it, Your Honor. Asking for permission is not

1 pursuing a claim and can't be the definition of pursuing a  
2 claim because it's not doing anything other than asking for  
3 permission.

4 We didn't file a suit. We didn't commence a suit. I  
5 think that's established. We did not pursue a claim. Mr.  
6 Morris ignores, I think, the very commonsensical aspect that  
7 we put out in the opening, which is that the reason pursue --  
8 and sometimes the language in these types of orders is,  
9 instead of pursue, it's maintain -- but the reason that word  
10 is there is because sometimes the case has already been  
11 started when the order is entered. And so to pursue a claim,  
12 i.e., one that's already been filed as of the date of the  
13 order, that would be lost if the commencement of that claim  
14 hadn't happened until after the -- until the -- if the  
15 commencement happened before the order was filed. That's the  
16 --

17 THE COURT: Okay. So are you saying it's a  
18 sequential thing?

19 MR. SBAITI: I'm not sure I understood your question,  
20 Your Honor. I'm sorry.

21 THE COURT: Well, I'm trying to understand what it is  
22 you're saying about how pursue should be interpreted.

23 MR. SBAITI: Sure.

24 THE COURT: I think you're saying you have to -- you  
25 can either have -- well, we've got a prohibition on commencing

1 an action.

2 MR. SBAITI: Yes.

3 THE COURT: And then the separate word pursue, I  
4 think you're saying that must refer to you already have an  
5 action that's been commenced and you're continuing on with it.  
6 Is that what you're saying?

7 MR. SBAITI: Yes, Your Honor.

8 THE COURT: Then why not use the word continue?

9 MR. SBAITI: Well, Your Honor, the choice of --

10 THE COURT: Kind of like 362(a) of the Bankruptcy  
11 Code, you know, is worded.

12 MR. SBAITI: Well, Your Honor, the choice of the  
13 wording of pursue at that point, Your Honor, I believe ends up  
14 being ambiguous, because by filing the motion here that would  
15 be pursuing a claim under that definition. So before I got  
16 permission to pursue a claim, I've got to pursue a claim.  
17 That's the problem that they have with the words that they're  
18 trying to get you to adopt, or the meaning of the words  
19 they're trying to get you to adopt.

20 If I came to this Court and said, Judge, I need  
21 permission, I need leave to file suit against Mr. Seery, and  
22 then the question is, well, you're not allowed to seek leave  
23 because that's pursuing the claim, it's infinitely regressive.  
24 And in fact, his closing argument just proved how it's  
25 infinitely regressive.

1                   THE COURT: Okay. Let me -- I'm not following this  
2 infinitely regressive or whatever the term was.

3                   MR. SBAITI: Yes.

4                   THE COURT: Just answer this very direct question.  
5 Why did you not file a motion for leave in the Bankruptcy  
6 Court? That would have clearly, clearly complied with the  
7 July order.

8                   MR. SBAITI: Your Honor, I believe we explained this  
9 in the opening. I took a stab at it. Mr. Bridges took a stab  
10 at it. We did not believe coming here and asking for leave  
11 and asking for -- for Your Honor to do what we don't believe  
12 Your Honor can do, would effectuate an estoppel or a waiver,  
13 which we didn't think was in the best interest of our client  
14 to have. Your Honor, this happens -- I don't believe this is  
15 the --

16                  THE COURT: Okay. Connect the dots. Make that clear  
17 as clear can be for me. You file a motion for leave --

18                  MR. SBAITI: Yes.

19                  THE COURT: -- to file this District Court action  
20 against the Debtor and Seery, and if I say yes, everything is  
21 fine and dandy from your perspective. If I say no, tell me  
22 again what your estoppel argument is.

23                  MR. SBAITI: Your Honor, the key question is whether  
24 us putting the Court's ability to decide colorability and the  
25 Court's gatekeeper functions, for us to invoke those functions

1 concerned us because there's case law that says that that  
2 effectuates an estoppel. And so we don't get our chance in  
3 front of an Article III judge to make that in the first  
4 instance.

5 THE COURT: Okay. Tell me what cases you're talking  
6 about and the exact context of those cases.

7 MR. SBAITI: Your Honor, I would have to defer to my  
8 partner on this one, Your Honor.

9 THE COURT: Okay.

10 MR. SBAITI: So, --

11 THE COURT: Because I'm just letting you know --

12 MR. SBAITI: Yes.

13 THE COURT: -- I am at a complete loss. I'm at a  
14 complete loss understanding what you're saying. I am.

15 MR. SBAITI: Well, Your Honor, the --

16 THE COURT: I don't understand. If you have followed  
17 the order to the letter and I tell you no, --

18 MR. SBAITI: Then --

19 THE COURT: -- what, you're saying you were worried  
20 you'd be estopped from appealing my order to the District  
21 Court and saying abuse of discretion or invalid order in the  
22 first place? You'd be estopped from taking an appeal?

23 MR. SBAITI: No, Your Honor. We wouldn't be estopped  
24 from taking an appeal.

25 THE COURT: Then why didn't you follow the letter of

1 the order?

2 MR. SBAITI: For one thing, Your Honor, asking the  
3 District Court made sense to us, given the order and given our  
4 understanding of the law. Certainly, we had other options, as  
5 Your Honor is pointing out. We could have come here. Our  
6 read of the law, our understanding of what we were doing, made  
7 it -- put us in, like I said, put us in the sort of  
8 jurisdictional and paradoxical position.

9 THE COURT: This is your chance to tell me exactly  
10 which law you think applies here. What case? What statute?

11 MR. SBAITI: Your Honor, like I said, I don't have  
12 those at the moment.

13 THE COURT: Why not? Your whole argument rides on  
14 this, apparently.

15 MR. SBAITI: Well, Your Honor, I don't know that our  
16 whole argument rides on that.

17 THE COURT: Okay.

18 MR. SBAITI: I mean, our argument rides on we don't  
19 think we violated the letter of the order. I think that's  
20 really what I'm -- what we're here to say, is that we didn't  
21 commence a lawsuit and we didn't pursue a claim by filing for  
22 leave in the District Court, just like filing for leave in  
23 this Court would not be pursuing a claim. It would be filing  
24 for leave.

25 THE COURT: I agree. Filing a motion for leave in

1 this Court would be exactly what the order contemplated.

2 MR. SBAITI: I understand, Your Honor.

3 THE COURT: What you did is not exactly what the  
4 order contemplated.

5 MR. SBAITI: Your Honor, but we're -- we're moving  
6 back and forth between two concepts. One, your question is  
7 why didn't we file for leave?

8 THE COURT: Uh-huh.

9 MR. SBAITI: And the answer to that, I've tried to  
10 explain. And if we -- if you'd like us to bring up the case  
11 law or to give you a better articulation of our concern, I'm  
12 happy to defer to my partner.

13 What I'm really here to say, Your Honor, is a very simple  
14 point, though. Just because we didn't file for leave here and  
15 we filed for leave in the District Court doesn't mean we  
16 violated your order, and that's the point I'm trying to make,  
17 Your Honor. And I think that's the simplest point I can make.  
18 Asking the Article III judge for leave to amend, for leave to  
19 amend to add Mr. Seery, doesn't violate, facially, at least as  
20 we read it, Your Honor's order. It's not commencing a suit  
21 and it's not -- it's not pursuing a claim against him. It's  
22 all preliminary to pursuing a claim against him, because a  
23 claim hasn't even been filed.

24 The judge could have -- the judge could have -- the  
25 District Court could have denied it, the District Court could

1 have referred it down here, the District Court could have  
2 decided part of it and then asked Your Honor to rule on some  
3 portion of it. There are innumerable ways that could have  
4 gone. That fork -- those forks in the road is precisely why  
5 we say this is not pursuing the claim. Otherwise, where does  
6 it stop?

7 Does pursuing a claim happen just when we file the motion  
8 for leave? Why didn't it happen when we started the  
9 investigation? If pursuing a claim means having the intent  
10 and taking steps towards eventually filing a lawsuit, that's  
11 the point that I'm making that it is infinitely regressive,  
12 and that's exactly what Mr. Morris argued to you.

13 He said Mr. Dondero, by merely speaking to me, is pursuing  
14 a claim and that violates your order. Speaking to me. Even  
15 if we had never filed it. Speaking is pursuing a claim.

16 THE COURT: I don't agree with that, for what it's  
17 worth.

18 MR. SBAITI: Okay. But that was his argument. I'm  
19 just responding to it.

20 THE COURT: Okay.

21 MR. SBAITI: And if that's not pursuing a claim,  
22 filing a motion for leave likewise wouldn't be pursuing a  
23 claim. I understand it's an official act in a court, but we  
24 did it in a Court that is an adjutant to this Court. This  
25 Court is an adjutant to that Court. It's the Court with

1 original jurisdiction over the matter. So we didn't go to New  
2 York. We didn't go to the state court in New York where I  
3 learned Mr. Seery lives. We came to the Northern District of  
4 Texas, understanding that this Court and this Court's orders  
5 had to be -- had to be addressed. And that's the very first  
6 thing we did. We asked the Court to address it.

7 That judge could either decide to send it down here, which  
8 is normally what I think -- what we understood would happen.  
9 So it's not like we were avoiding it. But we wanted to invoke  
10 the jurisdiction which we, as the Plaintiff, we believe we had  
11 the right to invoke. We're allowed to choose our forum. So  
12 that's the forum we chose for the primary case, which there's  
13 not a problem, no one's raised an issue with us filing the  
14 underlying lawsuit.

15 Adding Mr. Seery to that lawsuit and filing a motion for  
16 leave in the same court where we actually had the lawsuit,  
17 knowing that it might get -- that might get decided or  
18 referred in some way, doesn't strike me as being anything  
19 improper, because he didn't get sued and we don't know what  
20 Judge Boyle would have said had the motion gone forward. And  
21 for them to speculate and to say that, well, this is exactly  
22 the type of thing you have to protect against, I completely  
23 disagree.

24 The case law that they cited for you on these -- on most  
25 of these orders really do discuss the fact that you have

1 somebody who is actually protecting the underlying property of  
2 the Debtor. This claim comes from a complete third party that  
3 Mr. Seery himself has admitted under oath he owes a fiduciary  
4 duty to. Two third parties. One is an investor of a fund  
5 that he manages, and one to a fund that the Debtor, with Mr.  
6 Seery as the head of it, was an advisor for up until recently.

7 Those fiduciary duties exist. We felt like there was a  
8 valid claim to be brought against Mr. Seery. And the only  
9 reason -- and he says this like it's a negative; I view it as  
10 a positive -- the reason he wasn't named is because of Your  
11 Honor's orders. And so we asked a Court, the Court with  
12 general jurisdiction, to address it for us or to tell us what  
13 to do. And I don't see how that is a violation of this  
14 Court's order, nor is it contemptuous of this Court's order.

15 If every time one of these issues came up it was a  
16 contempt of the court that appointed a trustee, we'd see a lot  
17 more contempt orders.

18 Interestingly, the cases that were thrown out to you in  
19 the opening argument by the other side, for example, *Villages*  
20 [sic] v. *Schmidt*, was a trustee case, but not one that  
21 involved a sanction. And the trustee case specifically in  
22 that case held that the Barton Doctrine didn't have an  
23 exception for *Stern* cases, whereas the cases we cited to you,  
24 *Anderson*, for example, in the Fifth Circuit, which is 520 F.2d  
25 1027, expressly held that Section 959 is an exception to the

1 Barton Doctrine.

2       And my partner, Mr. Bridges, can walk through the issues  
3 that we had on the enforceability of the order, but all -- to  
4 me, all of that is sort of a secondary issue because, *prima*  
5 *facie*, we didn't violate this order. I understand it may  
6 irritate the Debtor and may raise questions about why the  
7 motion wasn't filed here versus the District Court. But it  
8 was a motion for leave. In order to sanction us, Your Honor  
9 would have to find that asking for permission is sanctionable  
10 conduct in the gatekeeper order. Even if we ask the wrong  
11 court. Simply asking the wrong court is sanctionable, not  
12 knowing what that court would have done, not knowing what that  
13 court's mindset was, not even having the benefit of the  
14 argument. And that's, I guess, where this bottom -- the  
15 bottom line is for me.

16       The evidence that they put on for you, Your Honor.  
17 Everything you heard was evidence in the negative. You know,  
18 they talk about the transition from Mr. Dondero to Mr. Scott  
19 and Mr. Scott to Mr. Patrick, but if you actually look at the  
20 evidence he wants you to see and he wants you to rule on, it's  
21 the evidence that wasn't there. It's the evidence that Mr.  
22 Dondero had no control. In fact, I believe that was the basis  
23 he argued for why there should be no privilege. And all he  
24 said is that he was promoting it.

25       But the fact of the matter is, like I said, all of that is

1 secondary to the core issue that we didn't violate the order.  
2 We didn't take steps to violate the order. We took steps to  
3 try to not violate the order. And they want you to punish us  
4 to send a message. Even used words like the Court needs to  
5 enforce its own orders. And he did that as a transition away  
6 from the idea that there were no damages, Your Honor, and I  
7 think that has implications.

8 And then he said you have to enforce a meaningful penalty.  
9 Well, Your Honor, I don't think that is the purpose of these  
10 sanctions. These sanctions are supposed to be remedial,  
11 according to the case law, according to the case law that they  
12 cite. So a meaningful --

13 THE COURT: Coercive or remedial.

14 MR. SBAITI: Sorry?

15 THE COURT: Coercive or remedial. Civil contempt.

16 MR. SBAITI: Sure, Your Honor. But usually coercive  
17 sanctions require someone to do something or they are  
18 sanctioned until they do it.

19 THE COURT: Coerced compliance. Coerced compliance  
20 --

21 MR. SBAITI: Yes.

22 THE COURT: -- with an existing order.

23 MR. SBAITI: Yes.

24 THE COURT: Uh-huh.

25 MR. SBAITI: The last thing, he says you have to

1 protect the estate of the fiduciary and his expectation -- I  
2 believe he's talking about Mr. Seery -- his expectation that  
3 the Court would be the gatekeeper. And Your Honor, that  
4 argument rings a little bit hollow here, given that what  
5 they're really saying is that we should have come here first  
6 and asked for permission. But that insinuates that, by coming  
7 here, the case is dead on arrival, which I don't think is the  
8 right argument.

9       I think the issue for us has been, who do we have to ask  
10 and who can we ask to deal with the Court's gatekeeper order?  
11 I believe we chose a court, a proper court, a court with  
12 jurisdiction, to hear the issue and decide the issue. Your  
13 Court's -- Your Honor's indication of the jurisdiction of this  
14 Court we believed invoked the District Court's jurisdiction at  
15 the same time.

16       And so the last thing is he said -- the last thing, and  
17 getting back to the core issue, is Mr. Morris wants you to  
18 believe that we intended to violate the order, and now, as an  
19 afterthought, we're using linguistic gymnastics to get around  
20 all of that. But it's not linguistic gymnastics. Linguistic  
21 gymnastics is saying that pursue means doing anything in  
22 pursuit of a claim. That's a little -- I believe that's  
23 almost a direct quote. They're chasing the man. Well, that's  
24 the infinite regression that I talked about, Your Honor, that  
25 it's going to be impossible in any principled way to reconcile

1 Mr. Morris's or the Debtor's definition of pursue with any  
2 logical, reasonable limitation that is readable into the  
3 order, Your Honor.

4 And I'm going to defer to my partner, Mr. Bridges -- oh,  
5 go ahead.

6 THE COURT: I'm going to stop you. I mean, we have  
7 the linguistic argument. But how do you respond to this?

8 MR. SBAITI: Sure.

9 THE COURT: What if I tell you, in my gut, this  
10 appears to be an end run? An end run. I mean, I'm stating  
11 something that should be obvious, right? An end run around  
12 this Court. This Court spent hours, probably, reading a  
13 motion to compromise issues with HarbourVest, issues between  
14 the Debtor and HarbourVest. I had objections. An objection  
15 from CLO Holdco that was very document-oriented, as I recall.  
16 Right of first refusal. HarbourVest can't transfer its 49.98  
17 percent interest in HCLOF, right? Talk about alphabet soup.  
18 We definitely have it.

19 MR. SBAITI: Yes.

20 THE COURT: Without giving CLO Holdco the first right  
21 to buy those assets. Read pleadings. Law clerk and I stay up  
22 late. And then, you know, we get to the hearing and there's  
23 the withdrawal -- we heard a little bit about that today --  
24 withdrawal of the objection. We kind of confirmed that two or  
25 three different ways on the record. And then I remember going

1 to Mr. Draper, who represents the Dugaboy and Get Good Trusts.  
2 You know, are you challenging the legal propriety of doing  
3 this? And he backed off any objection.

4 So the Court ended up having a hearing where we went  
5 through what I would call the standard 9019 prove-up, where we  
6 looked at was it in the best interest, was it fair and  
7 equitable given all the risks, rewards, dah, dah, dah, dah.  
8 You know, HarbourVest had initially, you know, started at a  
9 \$300 million proof of claim, eye-popping, but this all put to  
10 bed a very complicated claim.

11 MR. SBAITI: Yeah.

12 THE COURT: Tell me something that would make me feel  
13 better about what is, in my core, in my gut, that this is just  
14 a big, giant end run around the Bankruptcy Court approval of  
15 the HarbourVest settlement, which is not on appeal, right?  
16 There are a gazillion appeals in this case, but I don't think  
17 the HarbourVest --

18 A VOICE: It is on -- it is on appeal, Your Honor.

19 THE COURT: Is it? Oh, it is on appeal? Okay. So I  
20 may be told --

21 MR. SBAITI: I didn't know.

22 THE COURT: I may be told, gosh, you got it wrong,  
23 Judge. You know, that happens sometimes.

24 So, this feels like an end run. You know, the appeal is  
25 either going to prevail or not. If it's successful, then, you

1 know, do you really need this lawsuit? You know, I don't --  
2 okay. Your chance.

3 MR. SBAITI: Thank you, Your Honor.

4 THE COURT: Uh-huh.

5 MS. SBAITI: Your Honor, this wouldn't be the first  
6 case where finality or where there was a settlement -- I'm not  
7 familiar as well with bankruptcy, but certainly in litigation  
8 -- where the settlement then reveals -- well, after a  
9 settlement is done, after everyone thinks it's done, some new  
10 facts come to light that change people's views about what  
11 happened before the settlement or before the resolution. And  
12 that's what happened here, Your Honor. This is what we've  
13 pled. And this is what we understand.

14 There were the instances of Mr. Seery's testimony where he  
15 testified to the value of the HarbourVest assets. I believe,  
16 as I recall, he testified in I believe it's the approval  
17 hearing that Your Honor is talking about that the settlement  
18 gave HarbourVest a certain amount of claims of I think it's,  
19 Series 8 and then Series 9 claims, and that those were  
20 discounted to a certain dollar value that he quantified as  
21 about \$30, \$31 million. And the way he ratified and justified  
22 the actual settlement value, the actual money or value he was  
23 conferring on HarbourVest, given the critique of HarbourVest  
24 claims that he was settling, is he explained it this way. He  
25 said \$22-1/2 million of this whole pot that I'm giving them

1 pays for the HarbourVest -- HarbourVest's interests in HCLOF  
2 -- it's alphabet soup again -- and Highland CLO Funding,  
3 Limited. And so it's the other \$9 million that's really  
4 settling their claims. And given the amount of expense it's  
5 going to take, so on and so forth, \$9 million seems like a  
6 reasonable amount to settle them with, especially since we're  
7 just giving them claims.

8 So that \$22-1/2 million everyone apparently took to the  
9 bank as being the value, including CLO Holdco at the time,  
10 because they didn't have the underlying valuations. Highland  
11 was supposed to give the updated valuations.

12 So, fast-forward a couple of months -- and this is what  
13 we've played in our lawsuit, Your Honor; this is why I don't  
14 think it's an end run -- we pled in our lawsuit just a couple  
15 months later Highland -- I believe some of the people that  
16 worked at Highland started leaving, according to some  
17 mechanisms that I saw where Highland didn't want to keep all  
18 the staff and so the staff was migrated to other places. And  
19 one of those gentlemen, I believe Mr. Dondero referred to him  
20 as a gentleman named Hunter Covitz, and Hunter Covitz, who's  
21 also an investor in HCLOF, he owns a small piece of HCLOF, he  
22 had the data, he had some of the information that showed that,  
23 actually, in January, when Mr. Seery said that the HarbourVest  
24 settlement was worth 22 -- excuse me, the HarbourVest  
25 interests in HCLOF were worth \$22-1/2 million, that they're

1 actually worth upwards of \$45 million.

2 And so that information, Your Honor, we believe gives us a  
3 different -- a different take on what happened and what was  
4 supposed to happen. This is strictly about the lack of  
5 transparency.

6 THE COURT: Okay. Assuming --

7 MR. SBAITI: Yeah.

8 THE COURT: -- I buy into your argument that this is  
9 newly-discovered evidence --

10 MR. SBAITI: Yes.

11 THE COURT: -- CLO Holdco would not have had reason  
12 to know -- I guess that's what you're saying, right?

13 MR. SBAITI: I'm saying they -- they didn't know.

14 THE COURT: That they didn't know.

15 MR. SBAITI: Uh-huh.

16 THE COURT: And didn't have reason to know. I'm  
17 trying to figure out who's damaged here.

18 MR. SBAITI: Well, CLO Holdco, my client, is damaged,  
19 Your Honor.

20 THE COURT: How?

21 MR. SBAITI: Because one of the aspects of the -- of  
22 Highland, one of the issues under, excuse me, of Highland's  
23 advisory, is that it has a fiduciary duty. And that fiduciary  
24 duty, at least here, entails two, if not, three prongs. The  
25 first prong is they have to be transparent. You can't say --

1           THE COURT: How is -- you know, I know a lot about  
2 fiduciary duties, believe it or not. How is CLO Holdco harmed  
3 and the DAF harmed?

4           MR. SBAITI: Because, Your Honor, they lost out on an  
5 investment opportunity to buy the piece of -- the HarbourVest  
6 piece. They would have been able to go out and raise the  
7 money. They had the opportunity --

8           THE COURT: Okay.

9           MR. SBAITI: They would have had the opportunity to  
10 make a different argument.

11          THE COURT: What you're saying, you're saying, if  
12 they had known what they didn't have reason to know, that it  
13 was worth, let's say, \$45 million, that they would have gone  
14 out and raised money and said, oh, we do want to exercise this  
15 right of first refusal that we decided we didn't have and gave  
16 in on, we're going to press the issue and then outbid the \$22  
17 million, because we know it's worth more? Is that where  
18 you're going? I'm trying to figure out where the heck you're  
19 going, to be honest.

20          MR. SBAITI: That's -- Your Honor, I'd push back on a  
21 little of the phrasing, only because the way these duties --  
22 the way we understand the SEC's duties work when you're an  
23 investment advisor is you have a transparency obligation and  
24 an obligation --

25          THE COURT: Yes. Yes.

1                   MR. SBAITI: -- not to divert these. So, yes, CLO  
2 Holdco would have at least had the opportunity and been  
3 offered the opportunity, which it could have taken advantage  
4 of, to, if the assets were really on the block for \$22-1/2  
5 million, they should have been able to buy their percentage  
6 pro rata share of that \$22-1/2 million deal. I mean, in a  
7 nutshell, that's -- that's where we believe we've been harmed.  
8 And we believe that the obfuscation of those values and, to a  
9 certain extent, the misrepresentation of those values in the  
10 settlement is not cleansable by the argument, well, you should  
11 have asked.

12                  Well, you should have asked is fine in normal litigation,  
13 but when the person you should have asked actually owes you a  
14 positive duty to inform, we believe that the should-have-asked  
15 piece doesn't really apply and there's -- and that's, that's  
16 the basis of our case.

17                  So it's not an end run around the settlement, Your Honor.  
18 I think I opened with we're not trying to undo the settlement.  
19 We're not saying HarbourVest has to take its interest back.  
20 We're not saying the settlement has to go on. We're not even  
21 saying any of the things that happened in Bankruptcy Court  
22 need to change. But Section 959 is pretty clear that this is  
23 management of third-party property --

24                  THE COURT: I guess -- okay. Again, rabbit trail,  
25 maybe. But CLO Holdco still owns its same 49.02 percent

1 interest that it did before this transaction. So if there's  
2 value galore in HCLOF, it still has its 49.02 percent  
3 interest. What am I missing?

4 MR. SBAITI: Oh, I think Your Honor's assuming that  
5 HCLOF bought the piece back from HarbourVest. It didn't.

6 THE COURT: No, I'm not.

7 MR. SBAITI: Oh.

8 THE COURT: I'm not assuming that.

9 MR. SBAITI: Well, --

10 THE COURT: I know that now the Debtor has, what,  
11 fifty point, you know, five percent of HCLOF, whereas it only  
12 had, you know, a fraction.

13 MR. SBAITI: Point six-ish. Yeah.

14 THE COURT: Point six-ish, and HarbourVest had 49.98.

15 MR. SBAITI: Right.

16 THE COURT: So, again, please educate me. I'm really  
17 trying to figure out how this lawsuit isn't just some crazy  
18 end run around a settlement I approved. And moreover, what's  
19 the damages?

20 MR. SBAITI: Well, Your Honor, --

21 THE COURT: What's the damages? CLO Holdco still has  
22 its 49.02 percent interest in HCLOF.

23 MR. SBAITI: Your Honor, again, --

24 THE COURT: What am I missing? I must be missing  
25 something.

1 MR. SBAITI: I think so, Your Honor.

2 THE COURT: What?

3 MR. SBAITI: The damages is the lost opportunity, the  
4 lost opportunity to own more of HCLOF.

5 THE COURT: Oh, it could have owned the whole darn  
6 thing?

7 MR. SBAITI: I could have owned 90 -- whatever 49  
8 plus 49.98, 98.98 percent.

9 THE COURT: But --

10 MS. SBAITI: Or some pro rata portion.

11 THE COURT: But Mr. Seery had some information that  
12 you think he was holding back from CLO Holdco that CLO Holdco  
13 had no reason to know?

14 MR. SBAITI: Yes, Your Honor. The -- the -- what he  
15 testified to that the value of those assets, excuse me, the  
16 value of the HarbourVest interests in HCLOF or its share of  
17 the underlying assets being \$22-1/2 million was either, one,  
18 intentionally obfuscated, or, two, and I don't think this  
19 excuses it at all, he simply used ancient data and simply  
20 never updated himself, not for the Court and not for any  
21 representations to the investors, who he himself testified  
22 under oath in this Court that he has a fiduciary duty to under  
23 the Investment Advisers Act.

24 THE COURT: This could get very --

25 MR. SBAITI: So that's injury to my client, Your

1 Honor.

2 THE COURT: This could get really dangerous. Maybe

3 --

4 MR. SBAITI: I'm sorry.

5 THE COURT: This could get really dangerous. Maybe I  
6 should cut off where I'm going on this.

7 MR. SBAITI: Okay.

8 THE COURT: Of course, someone dangled it out there  
9 in a pleading. You know where I'm going, right?

10 MR. SBAITI: I'm not sure I do, Your Honor.

11 THE COURT: Hmm. I do read the newspaper, but  
12 someone put it in a pleading. HCLOF owns MGM stock, right?  
13 Is that what this is all about? Is that what this is all  
14 about? Or shall we not do this on the record?

15 MR. SBAITI: Well, Your Honor, this has nothing -- I  
16 don't -- I don't think this has anything to do with the MGM  
17 stock one way or the other.

18 THE COURT: You don't? OH?

19 MR. SBAITI: Your Honor, my charge as a counsel for  
20 the DAF is pretty straightforward. We looked at the claims.  
21 We looked at the newly-discovered information. We talked to  
22 the people who had it, Your Honor. That was our  
23 investigation. We put together a complaint. We believed that  
24 we had a good basis to file suit, despite Your Honor's -- the  
25 settlement approval. We expressly, because we understand how

1 finality is so critical in a bankruptcy context, we expressly  
2 didn't ask for rescission. We expressly didn't ask for  
3 anything that would undo the settlement.

4 Asking for damages because of how the settlement happened,  
5 through no fault of the Court's, of course, but asking for  
6 damages is not, at least not as I see it, an end run around  
7 the Court's settlement, and it's a legitimate claim. And I  
8 don't think this is far from the first time that new evidence  
9 has come up that's allowed someone to question how something  
10 was done that actually -- that actually damaged them.

11 THE COURT: Usually, they come in for a motion to  
12 reopen evidence to the court who issued the order approving  
13 the settlement.

14 MR. SBAITI: Well, Your Honor, I mean, that's --

15 THE COURT: Newly-discovered evidence.

16 MR. SBAITI: That would be the case in a final  
17 judgment, Your Honor. But, you know, our understanding of the  
18 way the settlement worked was that that was not necessarily  
19 going to be -- not the direction anybody wanted to go, but  
20 seeking damages on a straight claim for damages, which we're  
21 allowed to seek, which I think is our prerogative to seek, we  
22 went that direction.

23 THE COURT: Okay. Okay.

24 MR. SBAITI: But this --

25 THE COURT: My last question.

1 MR. SBAITI: Yes, Your Honor.

2 THE COURT: Again, I have to know. You have filed  
3 some sort of pleading to reopen litigation against Acis in New  
4 York? I'm only asking this because it's part of what's going  
5 on here. What is going on here?

6 MR. SBAITI: Your Honor, that's a -- that's a  
7 separate lawsuit, and it's not to reopen litigation against  
8 Acis. It deals with post-plan confirmation mismanagement by  
9 Acis.

10 THE COURT: Oh, okay. Okay.

11 MR. SBAITI: Yeah.

12 THE COURT: All right.

13 MR. SBAITI: But I believe there's a motion in front  
14 of Your Honor, just to -- that gave notice that the suit was  
15 filed, but I believe Mr. -- well, a bankruptcy lawyer filed  
16 it. I don't know.

17 THE COURT: A motion or a notice? I don't know.

18 MR. SBAITI: I don't know, Your Honor. That's above  
19 my paygrade.

20 THE COURT: I have not seen it. Okay?

21 MR. SBAITI: Okay.

22 THE COURT: Maybe it's there, but no one has called  
23 it to my attention.

24 MR. SBAITI: With the Court's permission, I'm going  
25 to yield time to Mr. Bridges.

1 THE COURT: Okay. Mr. Bridges?

2 CLOSING ARGUMENT ON BEHALF OF THE RESPONDENTS

3 MR. BRIDGES: Thank you, Your Honor. I'm grateful  
4 that you asked most of those questions to Mr. Sbaiti. I would  
5 not have been able to answer them. The one I can answer is  
6 the one about judicial estoppel. Apparently, I did a pretty  
7 lousy job earlier. I think I'm prepared to do a better job  
8 now.

9 The case law I'd like to refer you to is the Texas Supreme  
10 Court's 2009 decision in *Ferguson v. Building Materials*, 295  
11 S.W.3d 642. And this was my concern and my issue, perhaps  
12 because I used to teach it and so it was at the front of my  
13 mind. But contrary to what you would think and what you said  
14 earlier, it's not your ruling against us that would create a  
15 judicial estoppel problem. It's if you ruled in our favor.  
16 And I know that seems weird. Let me explain.

17 The two things that have to take place for there to be  
18 judicial estoppel are, first, successfully maintaining a  
19 position in one proceeding, and then taking an inconsistent  
20 position in another. And Your Honor, what we talked about  
21 earlier is the notion that your July order forecloses the key  
22 claim that Mr. Sbaiti was just describing, that Mr. Seery  
23 should have known. Not that he was grossly negligent or did  
24 intentional wrong, but that he breached fiduciary duties  
25 because he should have known and should have disclosed.

1       And if your order forecloses that and we come and convince  
2 you that we nonetheless have colorable claims, colorable  
3 claims of gross negligence or willful wrongdoing, that we  
4 ultimately are unable to prove, our lawsuit could fail, even  
5 though we had proved -- in the lawsuit we had proved he should  
6 have known and that he breached fiduciary duties, but we would  
7 be estopped, having succeeded from coming here and asking in  
8 compliance with the order and its colorability rule, that we  
9 would be estopped from then saying that this Court lacked the  
10 authority to have issued that order in the first place, to  
11 have released the claim on the mere breach of fiduciary duty  
12 or ordinary negligence. That's the inconsistency that I was  
13 concerned about.

14       By coming here rather than trying to make our objection  
15 and our position known without submitting to the foreclosure  
16 of that claim that is, in many ways, the most important, the  
17 headliner from our District Court complaint, is the concern,  
18 Your Honor. And frankly, if Your Honor's order does foreclose  
19 that, then we're in serious trouble. That's the claim that  
20 we're trying to preserve.

21       But Your Honor, I don't think it was in anyone's  
22 contemplation in July of 2000 that what that order would do is  
23 terminate -- 2020; sorry, Your Honor -- in July of 2020, that  
24 that order would terminate future claims that might arise  
25 based on future conduct that had not yet happened in Mr.

1 Seery's role. Not in his role as a manager of the Debtor's  
2 property, but in his role as a registered investment advisor  
3 on behalf of his clients and their property. And that is the  
4 concern that the judicial estoppel argument is about.

5 THE COURT: I still don't understand. I'm very well  
6 aware of judicial estoppel, the old expression, you can't play  
7 fast and loose with the court. Take one position in one  
8 court, you're successful, and then take another position in  
9 another court. That's the concept.

10 MR. BRIDGES: Coming here --

11 THE COURT: How is this judicial estoppel if you had  
12 done what I think the order required and asked this Court for  
13 leave? What -- and I said fine, you have leave. Where's the  
14 judicial estoppel problem?

15 MR. BRIDGES: If you say fine, you have leave, but  
16 that leave is only, as the order states, because we have  
17 colorable claims of gross negligence, colorable claims of  
18 intentional wrongdoing, what happens to our mere negligence  
19 and mere breach of fiduciary duty claims? Are they  
20 foreclosed? The order on its face --

21 THE COURT: Well, I would interpret the order to be  
22 yes, and then you could appeal me, and the Court would either  
23 say it's too late to appeal that because you didn't appeal it  
24 in July 2020, or fine, I'll hear your appeal. Where's the  
25 estoppel?

1                   MR. BRIDGES: Your Honor, our claims that this Court  
2 lacks the authority either to have made that order in the  
3 first place or the jurisdiction to rule on colorability now  
4 because of Section -- the mandatory abstention provision,  
5 whose section number I've now lost. That if we come to you  
6 and ask you to rule on those things, have we not thereby  
7 waived on appeal our claim that you couldn't rule in the first  
8 place on those things?

9                   That is what our motion for leave in the District Court  
10 argues, is that there's -- there are jurisdictional  
11 shortcomings with your ability to decide what we're asking  
12 that Court to decide. And Your Honor, by coming here first  
13 and then appealing, that's what we fear we would have lost.  
14 And instead of coming here and appealing, what we -- what we  
15 would have done, in the alternative, I guess, would be to come  
16 here and ask you not to rule but move to withdraw the  
17 reference of our own motion.

18                   That two-step, filing here and filing a motion to withdraw  
19 the reference on the thing we filed here, we didn't think was  
20 required, nor could we find any case law or rule saying that  
21 that was appropriate.

22                   THE COURT: Okay.

23                   MR. BRIDGES: These are not games, Your Honor. We  
24 were not trying to play games. We aren't bankruptcy court  
25 lawyers. We're not regularly in front of the Bankruptcy

1 Court. So the notion why didn't we come here first isn't  
2 exactly at the top of our mind. The question for trial  
3 lawyers typically is, where can we file this, what are the  
4 permissible venues, not why don't we come to Bankruptcy Court?  
5 Especially when your order appears to say that causes of  
6 action that don't rise to the level of gross negligence or  
7 intentional wrongdoing are already foreclosed.

8 Your Honor, the January order, I think I have to just  
9 briefly address again, even though I don't understand why it  
10 makes a difference. Apparently, counsel thinks it makes a  
11 difference because Mr. Dondero apparently supported it in some  
12 way. Our position is, for whatever difference it makes, the  
13 January versus the July, we don't believe there's anything in  
14 the District Court complaint putting at issue Mr. Seery's role  
15 as a director, so we don't understand how that order is  
16 implicated.

17 Again, I'm not sure that matters at all. I'm not raising  
18 it as a defense. I'm just telling Your Honor this is all  
19 about the July order, from our perspective. Certainly, the  
20 July order puts his role as a CEO -- certainly, the District  
21 Court case puts his role as a CEO at issue, and that's what  
22 the July order is about.

23 Your Honor, the *Applewood* case requires specifics in order  
24 to terminate our rights to sue and to bring certain causes of  
25 action, and without that kind of specificity, Your Honor, we

1 believe that that order fails to preclude, fails to have  
2 preclusive effect as to these later-arising claims. And we  
3 would submit not only that it was not contemplated, but that  
4 it was not intended to have that effect, and that even Mr.  
5 Seery's testimony suggests that that's not how he understood  
6 that order to be effective.

7 Counsel argued that the Barton Doctrine does apply here  
8 and rattled off the names of cases that don't -- to my  
9 knowledge, no case, no case that I can find deals with this  
10 type of deferential order where someone is asked -- where a  
11 court is asked to defer to the business judgment of an entity  
12 in approving an appointment, and nonetheless deciding that the  
13 Barton Doctrine applies. That's not what Villegas holds.  
14 That's not what *Espinosa* holds. I don't think *Barton* is  
15 applicable in a situation like that. Certainly, it's outside  
16 of the context of what *Barton* anticipated itself over a  
17 century ago when it was decided.

18 Your Honor, if we're wrong, please know we're wrong in  
19 earnest. These are not games. These are not sneakiness. No  
20 such motivation is at issue here. I was hopeful that that  
21 would be plain from the text of the motion for leave itself.  
22 If it's not, I'd offer this in addition. The docket at the  
23 District Court shows that immediately upon filing the motion  
24 for leave, a proposed order was filed with it asking to have  
25 the proposed complaint deemed filed, which as soon as I saw I

1 asked us to immediately retract it and to substitute a new  
2 proposed order that does not ask for the amended complaint to  
3 be deemed filed. That is not what we wanted.

4 And the fear was what if our motion is granted because the  
5 District Court says you have the right, you don't even need  
6 leave, but as to the Bankruptcy Court, you're on your own,  
7 this is at your own risk, I'm not going to rule on any of the  
8 jurisdictional questions that you attempt to raise? We did  
9 not want our complaint deemed filed for that reason. What we  
10 did want was for a court where we did not risk judicial  
11 estoppel to decide whether or not our key claim under the  
12 Advisers Act had been foreclosed by your July order, and that  
13 was the key and motivating factor.

14 On top of that, Your Honor, instead of arguing the meaning  
15 of the word pursue, let me just say this. We understood  
16 pursue in that context to refer to claims or causes of action,  
17 not potential, unfiled, unasserted, contemplated claims or  
18 causes of action. That until a claim or cause of action is  
19 actually asserted in some way, that it can't be pursued, and  
20 that the reference here was to two kinds of action, those that  
21 had not yet been commenced -- and your order foreclosed the  
22 commencing of them without permission -- and those that had  
23 been commenced. And your order couldn't foreclose the  
24 commencing of them because they hadn't been commenced yet, but  
25 your order did foreclose pursuing them.

1       And that was my reading of what that order said. And it  
2 fits with this notion that a claim or cause of action isn't  
3 something you're considering or even researching. It didn't  
4 dawn on us that researching or talking to a client about a  
5 potential claim could violate the order because in some  
6 respect that conversation could be in pursuit of the claim.

7       By the same notion, we didn't think asking a court with  
8 original jurisdiction according to Congress, asking a court to  
9 decide whether or not we were foreclosed from bringing our  
10 claims in a motion for leave was violating your order.

11      We don't have much else, Your Honor. In terms of the need  
12 to enforce compliance with your orders, if we understand them,  
13 we sure as heck are going to follow them. And if we've  
14 misconstrued the term pursue, I'm certainly very sorry about  
15 that.

16      I appreciate counsel saying he thinks we're probably good  
17 people. I did not think what we did was any kind of gross  
18 error in judgment. I thought that what we were doing was  
19 preserving our clients' rights, going to a court of competent  
20 jurisdiction, and asking the question, can we do what we think  
21 we ought to be able to do, but is -- frankly, Your Honor,  
22 we're a bit confused about because of the order that seems on  
23 its face to foreclose the very lawsuit that we think we should  
24 be bringing on behalf of this charitable organization that  
25 foreclosed it months before the conduct at issue that gave

1 rise to the complaint. And with that conundrum, knowing what  
2 to do was not obvious or easy for the lawyers or for the  
3 client who was dependent on his lawyers to give him good,  
4 sound advice.

5 I'm very grateful for you giving us the time and for your  
6 very pointed questions. Thank you, Your Honor.

7 THE COURT: Thank you. All right. Who's next?

8 CLOSING ARGUMENT ON BEHALF OF MARK PATRICK

9 MR. ANDERSON: May it please the Court, Michael  
10 Anderson on behalf of Mr. Patrick, Mark Patrick.

11 You know, this is a contempt proceeding. It's very  
12 serious. And, you know, my stomach aches for the people here.

13 THE COURT: Mine does, too, by the way.

14 MR. ANDERSON: It truly aches.

15 THE COURT: Uh-huh.

16 MR. ANDERSON: And I mean what I said when I did  
17 opening, when I said we don't need a hearing, an evidentiary  
18 hearing. And I still don't believe we did, because it comes  
19 down to what does the word pursue mean, because there's  
20 already been an acknowledgement --

21 THE COURT: Do you all want to withdraw all your  
22 exhibits? I've got a lot of exhibits that I now need to go  
23 through. If I admit them into evidence, I'm going to read  
24 them.

25 MR. ANDERSON: No, I understand.

1 THE COURT: Uh-huh.

2 MR. ANDERSON: But it does come down to the word  
3 pursue. Counsel has already said commence doesn't do it, and  
4 so then it's pursue.

5 And I could ask Your Honor, what did you mean when you  
6 said pursue in the July order, but I'm not going to say that.  
7 And I asked my client on the stand, you know, did you pursue a  
8 claim or cause of action? And then it was very telling. What  
9 happened with counsel? He stood up and objected to me even  
10 asking if it was pursued. And it dawned on me, if he's going  
11 to object, does pursue have some sort of legal -- that was his  
12 objection. It was he objected on legal grounds. Does that  
13 have some sort of legal meaning?

14 This is contempt. You can't be held in contempt unless it  
15 is bright-line clear that you have deviated from a standard of  
16 conduct and there's no ambiguity. Well, clearly, there is  
17 ambiguity, because over on this side of the room we say filing  
18 a motion for leave can't be pursue. We can look at the order  
19 and we know it doesn't mean pursue because I just heard Your  
20 Honor say you should have filed a motion for leave in this  
21 Court before doing anything. All right? So if that -- if  
22 that is what without the Bankruptcy Court first determining,  
23 if that's what the motion for leave is, well, then if we go up  
24 to the first sentence, No entity may commence or pursue a  
25 claim or cause of action, then it has this, without the

1 Bankruptcy Court first determining, that means -- if pursue  
2 means a motion for leave, if that's what that means, then that  
3 order says you can't commence or file a motion for leave  
4 before you file a motion for leave. Because that's what it  
5 means. If pursue means motion for leave and you've said you  
6 should have come here and filed a motion for leave because it  
7 says, Debtor, without the Bankruptcy Court first determining  
8 that notice that such claim or cause of action represents a  
9 colorable claim, and specifically authorizing. The vehicle to  
10 do that would be a motion for leave, right? And you can't  
11 pursue anything until a motion for leave has been filed.

12 Now, where was the motion for leave? And I understand,  
13 Your Honor, you know, no expert at reading the room,  
14 obviously, you're frustrated that the motion for leave was  
15 filed in the District Court and not in this Court. But it  
16 doesn't change the fact, and neither did any of the evidence,  
17 change anything, is what does pursue mean?

18 And if someone says, well, it's obviously clear it means  
19 x, well, is it really obviously clear it means filing a motion  
20 for leave? Because nobody on my side, when you read it, when  
21 you say pursue, can read it that way. And if we're going to  
22 have contempt sanctions being posed, and there has to be clear  
23 and convincing evidence or beyond reasonable doubt, depending  
24 upon, you know, I don't think you have to get to that part,  
25 but clear --

1 THE COURT: This is not criminal contempt.

2 MR. ANDERSON: Clear and convincing is the civil  
3 standard for contempt.

4 THE COURT: Right.

5 MR. ANDERSON: And if pursue is open to that much  
6 interpretation, it's not the kind of thing that can be held in  
7 contempt on. And I understand the frustration. I hear the  
8 frustration. I hear counsel talk about that was not their  
9 intent when they filed it. You know, I heard Mr. Patrick get  
10 up there. I heard counsel say, hey, Mr. Patrick's doing his  
11 job, he's a good guy, seems like a good guy. Well, Mr.  
12 Patrick's up there. Look, they filed the underlying lawsuit.  
13 Nobody -- there's no motion for that in this Court about the  
14 underlying lawsuit. It's only about the motion for leave.  
15 That's all we're here about.

16 And so you go to that, and we've heard all these arguments  
17 about it, and we've been here almost as long as the motion for  
18 leave was actually on file before it was sua sponte dismissed  
19 without prejudice.

20 And so I go back to that and I say that, if pursue means  
21 filing a motion for leave, then that order would require an  
22 order for anyone to violate -- it would be violated upon the  
23 filing of a motion for leave, because you can't pursue  
24 something until the Bankruptcy Court has already first  
25 determined, after notice, that such claim or cause of action

1 represents a colorable claim and specifically authorizing the  
2 entity to bring such a claim. Because that -- we already know  
3 that's a motion for leave in and of itself. Therefore,  
4 pursue, just simply filing a motion for leave will put you in  
5 that.

6 But that gets into all these -- we don't need to be having  
7 this discussion about, you know, is a motion for leave pursue?  
8 Is pursue a motion for leave? I've heard both arguments here.  
9 It doesn't justify contempt. And I know -- and so certainly  
10 with respect to my side, I, you know -- given that, I would  
11 request that the Court deny the request for contempt.

12 And again, I want to say, too, look, we hear you.  
13 Absolutely hear you. Understand the frustration. Totally  
14 hear you on that.

15 I'm going to turn over the balance of my time to Mr.  
16 Phillips, --

17 THE COURT: Okay.

18 MR. ANDERSON: -- unless you have any questions, Your  
19 Honor. I appreciate it.

20 THE COURT: Okay. I do not.

21 CLOSING ARGUMENT ON BEHALF OF MARK PATRICK

22 MR. PHILLIPS: Your Honor, Louis M. Phillips, and  
23 I'll be brief. I'm going to try to bring it down to -- I was  
24 not involved. We are -- we are here because of the  
25 indemnification provisions of CLO Holdco representing Mr.

1 Patrick individually. My firm was not involved in the  
2 litigation. We were hired to represent CLO Holdco and some of  
3 the defendants in the UCC litigation, and our role has  
4 expanded to do some other stuff, particularly represent Mr.  
5 Patrick because of the indemnification provisions of the  
6 Holdco entity documents. He's entitled to indemnification and  
7 we're providing a defense for him. That's why we're here.

8 So I come way after the order. We have not been involved  
9 in anything. But I think I'm just going to try to distill  
10 everything about the order and about the concern and about the  
11 litigation, because the Court is asking about is this an end  
12 run on the settlement? The Court is also saying, all you had  
13 to do was come here first.

14 But let's look. We're here about one thing, the motion  
15 for leave. And as Mr. Anderson pointed out, the commence or  
16 pursue a claim, according to the order, commence or pursue can  
17 only occur after the Court has authorized the litigation.  
18 Okay. So that's what the order says. You can't commence or  
19 pursue.

20 Counsel for the Debtors says, well, it can't be after  
21 commencement because you've already commenced the action. So  
22 pursue has to mean something before the commencement of the  
23 action. It would mean something before the commencement of  
24 the action under this order.

25 But it doesn't mean something before the Court approves

1 the commencement of the action, because commence or pursue  
2 under this order does not occur before the Court has acted.  
3 That's the language of the order. It only occurs after the  
4 Court has authorized it. That's the context in which commence  
5 or pursue exists, after this Court has authorized.

6 Okay. So it can't be pursuit before the Court has  
7 authorized without commencement because it only is triggered  
8 by the Court's authorization of the action, which means,  
9 before you commence it, actions in time take time, before you  
10 commence the action, you have to pursue the action to commence  
11 it. But you can't do that until you've approved it. All  
12 right?

13 That's the temporal concern and why we say the motion for  
14 leave can't be pursuit of an action under this order. It  
15 might be pursuit under another definition or another order.  
16 In other words, maybe an order could be issued saying, you  
17 can't file a motion for leave in any other court but this one.  
18 I don't know whether it'd be a good order, but the order could  
19 say that. But when you say all you had to do was file a  
20 motion for leave in this Court and everything would be okay,  
21 no. The motion for leave is not, under this order, pursuit.  
22 Pursuit only occurs under this order after you've done  
23 something, after Your Honor has done something.

24 So if a motion for leave is violative at the District  
25 Court, the motion for leave would be violative here, because

1 it occurs before Your Honor has taken action.

2 Now, clearly, you want people to ask, but just as clearly,  
3 and this was the point of my remarks earlier at the tail-end  
4 of opening, just as clearly, I have a question, because  
5 frankly, I understand what these guys are saying. These guys  
6 haven't really said it. They're a little shame-faced at what  
7 these guys are asking. Because what these guys are asking is  
8 whether or not an employee Seery, as the CRO -- and we heard,  
9 oh, he bargained for it, he wouldn't have done it without  
10 getting the order and the protections because -- did he  
11 bargain for not having to comply with the Investor Advisory  
12 Act? Did he bargain for not having a fiduciary duty to third  
13 parties? Because the one thing that Mr. Bridges has been  
14 trying to tell you is that, under this order, if it's  
15 interpreted one way, you would never authorize a violation of  
16 the Investment Advisory Act because it wouldn't necessarily be  
17 gross negligence or willful misconduct.

18 In other words, in employing Seery, did the Debtor go out  
19 in this disclosure statement and say, we are advisor to \$1.2  
20 billion of third-party money, and guess what, our CRO has no  
21 fiduciary duty to you? We have forestalled any claim under  
22 the Investment Advisory Act in our employment order. Did that  
23 happen?

24 Because if that happened, I don't know if the Court was  
25 really thinking that way, because that -- that can't happen in

1 a confirmation order before, under the Fifth Circuit  
2 authority, after disclosure statement, plan, et cetera, et  
3 cetera, because that's a third party release of claims that  
4 may -- that haven't occurred yet. You would be releasing  
5 because you would be saying you have no right. You have no  
6 right. This is not temporal. This is saying you have no  
7 right, if it's saying that, to bring an Investment Advisory --  
8 Investment Advisory Act or a Breach of Fiduciary Duty Act  
9 that's not gross negligence or willful misconduct forever upon  
10 an employment order.

11 Now, if that's not what it means, then we have another  
12 conundrum. The other conundrum -- and I'm new to this, maybe  
13 this has been thought out by everybody, but I don't think so.  
14 The other conundrum is this order doesn't apply to actions  
15 that don't involve willful -- gross negligence or willful  
16 misconduct. It only applies to those types of actions. So,  
17 frankly, I don't know what the order does.

18 I think the problem -- I probably shouldn't be the  
19 purview of who ought to know because my standard's probably  
20 really low, given my capacity here. But I'm a guy off the  
21 street. Seery gets hired to run the Debtor. Seery testifies  
22 and he admits, we've got Investment Advisory Act all over the  
23 place. We're making lots of fees out of administering all  
24 this third-party money. Do they know? Do they know he's  
25 immune? Do the third parties know?

1       Now, a standard about managing the Debtor? Absolutely.  
2 That's just pure D Chapter 11, pure D corporate, pure D  
3 standard liability if you're operating an entity. You're not  
4 liable for gross negligence or willful misconduct. You're  
5 not. And so any claim for damage to the Debtor or to the  
6 estate by actions taken in the CRO capacity, absolutely.  
7 Absolutely. You don't want a bunch of yoyos suing, you did  
8 something against the Debtor and the Debtor is now worth \$147  
9 less than it was because you did something, you were negligent  
10 and you forgot to put the dog out. No. It's got to be gross  
11 negligence or willful misconduct if you are talking about  
12 running the Debtor and running the estate.

13       But that's not what we have here. And you can ask all the  
14 questions you want about whether the lawsuit's any good, but  
15 that's not what's up before the Court. What's up before the  
16 Court is whether filing a motion for leave is contempt. And  
17 under this order, you're saying, all you had to do is come  
18 here. Well, in one reading of it, you'd have never got relief  
19 because you can't bring the kind of action. I foreclosed it  
20 by employing Seery. He no longer has a fiduciary duty and is  
21 no longer bound by the Investment Advisory Act. Case closed.  
22 Get out of here. Unless you can formulate something around so  
23 that you can establish gross negligence or willful misconduct,  
24 I've done away with all those causes of action.

25       I don't think that's what happened. And if that's not

1 what happened, this doesn't apply because it shouldn't apply  
2 to third-party actions. It should apply to actions for damage  
3 to the estate by creditors of the estate for whom Seery is  
4 acting as CRO of the Debtor, who is the -- in possession of  
5 the estate. That makes perfect sense. Perfect sense. And  
6 nobody would say that you shouldn't have sole authority to  
7 determine whether a CRO who's acting for the estate and  
8 damages the estate -- because that'd be a claim against the  
9 estate. That would be an administrative claim against the  
10 estate. That is just hornbook law.

11       That's the way I see this order. And I admit I didn't  
12 write it. I admit I didn't submit it. I admit I didn't  
13 litigate it. I admit I'm coming in late. But sometimes maybe  
14 a fresh pair of elderly, trifocal-assisted eyes doesn't hurt.  
15 Because I will tell you, Judge, on one read this Court says  
16 don't bother coming here because you don't have the kind of  
17 claim that can be brought, even if you're a third party. And  
18 the only way that happens is if Seery's released from any  
19 obligation under the Investment Advisory Act, and I think  
20 everybody would like to know that. And he can't be sued for  
21 breach of fiduciary duty to third parties that he admits he  
22 owes. I think people would like to know that.

23       And if it doesn't, then this is not -- this order is not  
24 about that. But the fact -- I've been at this 40 years, and I  
25 usually don't want to talk about myself. There's really not a

1 lot to talk about. But I hear Mr. Morris how he's never done  
2 this, he's never done that. I hear this, I'm a good -- you  
3 know, whatever. I'm confused. I've been doing this 41 years.  
4 Bankruptcy, 39.7. I must be crazy, but that's what I've been  
5 doing. And I'm confused because I don't even know if they  
6 needed to come here. I don't even know if, had they come  
7 here, if they could have even presented an action for gross --  
8 for negligence or breach of fiduciary duty, could have --  
9 gross negligence or willful misconduct? I don't know whether  
10 this order just applies to Seery's duties as CRO vis-a-vis  
11 creditors of the estate and property of the estate and damage  
12 to the estate. Because that's not what we're dealing with  
13 here.

14 The point is, Judge, this is contempt. And I understand  
15 Your Honor knows all about contempt. Your Honor knows about  
16 *Matter of Hipp*. Your Honor knows about civil contempt  
17 authorization for bankruptcy courts. Your Honor knows that  
18 you can't operate without the right to impose civil contempt  
19 sanctions. And Your Honor knows, and I agree with Your Honor,  
20 that civil contempt is both remedial and coercive.

21 But how do you coerce around my questions? Maybe I am all  
22 wet, but if I am, I don't think I am, and I don't understand  
23 that I am, and that's why I'm concerned about going off into  
24 this contempt wilderness and millions in fees, when the motion  
25 for leave was dismissed and when the lawsuit doesn't ask for

1 or includes most of its claims. I don't even -- I have not  
2 studied the lawsuit. I wasn't involved in it. But if it's a  
3 breach of fiduciary duty and Advisory Act and it says what  
4 you've been told it says, that he should have pulled up  
5 different stuff, that the valuation metrics were different,  
6 that he shouldn't have used it, I don't know that they're  
7 saying fraud. I don't know that they're saying he knew he was  
8 doing -- I think they're saying he breached the Investment  
9 Advisory Act. And that's not gross negligence or willful  
10 misconduct. Then does this order apply or this order -- does  
11 this order foreclose that?

12 The fact is, I think we could have decided this on the  
13 pleadings and on the order. We didn't. The fact that Mr.  
14 Dondero did A, B, C. And I will tell you this. Mr. Patrick  
15 has stood up. He's going to get a harpoon, he's going to get  
16 a harpoon, subject to his right to appeal. But he has told  
17 this Court. We represent him. We're not trying to get him  
18 out of having authorized the order. It's very important for  
19 this Court to understand. Mr. Patrick is one of these  
20 entities. Mr. Dondero can holler and scream all he wants to.  
21 Mr. -- and look, did he terminate Grant Scott? If I'm Grant  
22 Scott, and this is my best friend and I was in his wedding and  
23 I was his roommate and I was his best friend and I'm doing  
24 this stuff for \$5,000 and I do something and \$5,000 a month  
25 and I do something and I get hollered at and I've got a full a

1 law practice, I'm an IP lawyer, why don't I just tell him to  
2 go jump in a lake, which is the other way you could look at  
3 Grant Scott leaving. I want you to jump in a lake. I'm out  
4 of here. I don't need this.

5 Thank you.

6 THE COURT: All right. Thank you.

7 MR. DEMO: Your Honor, how much time do they have  
8 left, --

9 THE COURT: Um, --

10 MR. DEMO: -- to be honest?

11 THE COURT: Nate, are you -- 26 minutes? All right.

12 MR. TAYLOR: I'll go way under, Your Honor.

13 THE COURT: Okay.

14 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

15 MR. TAYLOR: Your Honor, Clay Taylor. I'm here on  
16 behalf of Mr. Dondero. He was named as an individual alleged  
17 violator within the order.

18 THE COURT: Okay. I'm getting lawyers mixed up. Mr.  
19 Anderson, who did you represent?

20 MR. ANDERSON: Mr. Patrick. Mr. Phillips and I  
21 represent --

22 THE COURT: You're Mr. Patrick?

23 MR. PHILLIPS: We're Mr. Patrick.

24 THE COURT: You're both --

25 MR. PHILLIPS: Mr. Patrick.

1           THE COURT: Okay. I'm sorry. I'm getting my Fort  
2 Worth law firms mixed up. Okay.

3           MR. TAYLOR: That's quite all right. Clay Taylor  
4 from Bonds Ellis here on behalf of Mr. Dondero. And we're  
5 here because he was named in the alleged violator motion  
6 within the order as an alleged violator. We don't think that  
7 he is, for the reasons that we're about to explain, but we  
8 were ordered to appear --

9           A VOICE: No.

10          MR. TAYLOR: -- and so therefore we are appearing and  
11 telling you why we're not an alleged violator.

12          First of all, for all the reasons that Mr. Sbaiti and Mr.  
13 Bridges and Mr. Phillips and Mr. Anderson said, the court  
14 order was in effect. We agree with that. It required certain  
15 conduct to be done. Yes, it did. It said you couldn't  
16 commence something. It said you couldn't pursue it. I think  
17 we have gone through what the pursuit and commence. Nobody is  
18 arguing that anything was commenced. It comes down to  
19 pursuit.

20          But let's talk about what the evidence shows about Mr.  
21 Dondero. It shows that Mr. Dondero believes that there have  
22 been breaches of fiduciary duty. He thinks that there has  
23 been negligence committed. He believes that actions should be  
24 taken. We don't run away from that. He, frankly, told you  
25 that.

1       But here, he didn't take any action to pursue it. The DAF  
2 did. CLO Holdco did. It's undisputed that he's not an  
3 officer, director, or control person for either of those  
4 entities. The act we're here on is a motion for leave to file  
5 an amended complaint to include Mr. Seery. That's -- Mr.  
6 Dondero didn't take any of those acts. He believes it should  
7 have been done, but he's not the authorizing person.

8       He might have -- let's just pretend that he thought he was  
9 authorizing something. It doesn't matter that he thought he  
10 could authorize something or that he was trying to push for  
11 it. The fact remains he can't authorize it. You know, he can  
12 say, I declare war on Afghanistan. Well, he can't. Congress  
13 can't. He can write a letter to his Congressman. He already  
14 wrote a letter to his Congressman. He talked. He talked with  
15 the head of the acting CLO -- CLO Holdco and he said, I think  
16 there's something wrong here. I think you should be looking  
17 into it. You know what, he goes, you might be right. Go talk  
18 with Mazin about it. Give him some data. Conduct an  
19 investigation. They did. And then they went to the  
20 authorizing person and they filed a motion for leave to  
21 include Mr. Seery. Mr. Dondero did nothing wrong in that.

22       Now, there is some personal animosity. I think that Your  
23 Honor has probably seen there seems to be some personal  
24 animosity between Mr. Seery and Mr. Dondero, and that's  
25 unfortunate. But just because there's some personal animosity

1 doesn't mean that maybe something wasn't done wrong. Maybe  
2 that Mr. Dondero -- he's certainly allowed to at least tell  
3 people, well, I think there was something done wrong. And if  
4 there is an action to be had, then those appropriate entities  
5 can take it. But he didn't do those things.

6 And so even if he says, just like Michael Scott, "I  
7 declare bankruptcy," it doesn't matter. You have to take the  
8 certain actions.

9 THE COURT: I got it. I don't know if everyone did.

10 MR. TAYLOR: Yes, well, yeah, you have to be a *The*  
11 *Office* fan.

12 But so that's where we stand. And for all the reasons the  
13 prior people have discussed, I don't think that there was any  
14 violation of this Court's order. But even if there was, Mr.  
15 Dondero in this situation was not the one. We're going to  
16 have to deal with the other order that came out yesterday in  
17 due course, but for this discrete issue that is before this  
18 Court today, Mr. Dondero didn't violate anything.

19 Thank you.

20 THE COURT: All right. Mr. Morris, you get the last  
21 word.

22 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

23 MR. MORRIS: Thank you, Your Honor. These are going  
24 to be discrete points because it's truly rebuttal. I'm going  
25 to try to respond to certain points.

1       Mr. Bridges and Mr. Phillips made extensive arguments  
2 about why they believe the order is wrong, why it's  
3 overreaching. They tried to get into your head to think about  
4 what you intended or what you thought. The fact of the matter  
5 is, the answer to all of those questions -- first of all, none  
6 of it's relevant to this motion because we've got the order --  
7 but the answer is very simple. Forget about coming here to  
8 seek leave to amend to add Mr. Seery. We can avoid Mr.  
9 Sbaiti's concerns about judicial estoppel or something. Why  
10 didn't they just file the motion for reconsideration? They  
11 filed that after they filed the motion for leave to amend,  
12 after we filed the motion for contempt. Only then did they  
13 file the motion for reconsideration.

14       Now, we think it's ill-thought-out. We think it's  
15 problematic. Probably not today, is my guess, we'll argue to  
16 you as to why we think that motion ought to be denied. But if  
17 they truly believed that the order was infirm in any way,  
18 wouldn't the proper thing to have been to come here and tell  
19 you that? Wouldn't the proper thing to be to come to the  
20 court that issued the order that you have a problem with and  
21 ask the court to review it again? And if Your Honor overruled  
22 the motion, to appeal it.

23       Why are we even doing this? Why did they do it? It's not  
24 we. Why did they do it? Right? And that solves almost  
25 everything they've said. That's point one.

1           Point two, the January order. The January order is very  
2 important. It's important not just because it applies to  
3 directors, but it's important because Mr. Dondero agreed to  
4 it, and it also applies -- I want to get it -- Paragraph 10.  
5 It's Exhibit 15. It applies to the independent directors and  
6 the independents directors' agents. If a CEO is not an agent  
7 of an independent director, I'm not sure what is. The  
8 independent directors are the body that appointed the CEO.  
9 The CEO, Mr. Seery, is acting on behalf of the board. This is  
10 the order that Mr. Dondero agreed to. It's the order -- take  
11 out the word independent director; put in Mr. Seery -- it's  
12 the order everybody's complaining about. But even the January  
13 order certainly applied to Mr. Seery. That's point two.

14           Point three. I've heard a lot of concerns about the  
15 slippery slope and what does pursuit mean and does talking to  
16 a lawyer mean pursuit and doing an investigation being  
17 pursuit. I don't know, Your Honor, and I don't care, because  
18 that's not what we're here to talk about. We're here to talk  
19 about a specific act -- not a hypothetical, not a slippery  
20 slope. We're talking about the filing of a motion for leave  
21 to amend a complaint to add Mr. Seery as a defendant. That's  
22 all we're talking about. So, you know, the rest of it, it's  
23 just noise. And the only question is whether, and I think  
24 it's pretty clear, that means pursuit.

25           Another version on the theme of was there any alternative

1 to filing the motion in the District Court, I think there was.  
2 The Sbaiti firm did file that suit against Acis in New York.  
3 And if Your Honor checks the docket in the Acis bankruptcy, I  
4 think you'll find that there's a motion from Mr. Rukavina, for  
5 a comfort order, basically, saying that -- asking the court to  
6 declare that the filing of the complaint in New York against  
7 Acis didn't violate the plan injunction. I think I have that  
8 right.

9       But I point that out, Your Honor -- it's not evidence in  
10 the record, but the Court can certainly take judicial notice  
11 of what's on its docket -- I point that out because there's  
12 another example of a lawyer who is very active in this case  
13 who actually -- now, he already commenced the suit, so he did  
14 -- they did both simultaneously, so I don't want to suggest  
15 that that's the perfect thing to have done, but at least he's  
16 here asking for -- he's bringing it to your attention, he's  
17 telling you it's happened, he's asking for a comfort order,  
18 and someday Your Honor may rule on it. I don't know.

19       Number six, what's with the pursuit of Mr. Seery? What is  
20 with the pursuit of Mr. Seery? Is there any doubt in  
21 anybody's mind that the Debtor is going to have to indemnify  
22 Mr. Seery and will bring in another law firm? And while I  
23 don't think it will ever happen in a hundred billion years, if  
24 there is a judgment against Mr. Seery, isn't that going to be  
25 the Debtor's responsibility? Why are they even bothering to

1 do this? I think it's a fair question for the Court to ask.

2 I think Mr. Taylor came up and talked about animosity.

3 How do you explain going after Jim Seery? How do you do it?

4 He's going to be indemnified. It's in -- it's in like three

5 different orders. It's in the confirmation order. It's in

6 the CEO order. It's -- it's probably as a matter of law.

7 It's in the Strand partnership agreement. It's -- he's been

8 indemnified like 12 different times. What is the purpose,

9 other than to make Mr. Seery's life miserable? There is none.

10 You'll never hear a rational explanation for why they're doing  
11 this.

12 THE COURT: Just so you know, I've not looked at any  
13 of the pleadings in the District Court --

14 MR. MORRIS: And I'm not asking you to.

15 THE COURT: -- other than what has been presented to  
16 me today.

17 MR. MORRIS: Yeah. That's fine, Your Honor.

18 THE COURT: But I'm very flipped out about the causes  
19 of action against the Debtor, --

20 MR. MORRIS: Yeah.

21 THE COURT: -- who hasn't reached an effective date.

22 MR. MORRIS: Well, --

23 THE COURT: And I'm most interested to know what the  
24 defenses, motions --

25 MR. MORRIS: We'll get to that.

1                   THE COURT: -- are going to be raised in that regard.

2                   MR. MORRIS: We will get to that in due course.

3                   I do want to point out, just to be clear, because we keep  
4 hearing that they learned about, you know, all of these  
5 horrible things after the fact. In the complaint, which I  
6 think is Exhibit 12, --

7                   THE COURT: I'm there.

8                   MR. MORRIS: -- at Paragraph 127, the Plaintiffs  
9 allege, "Mr. Seery was informed in late December 2020 at an  
10 in-person meeting in Dallas, to which Mr. Seery had to fly,  
11 that HCO" -- excuse me "HCLF and HCM had to suspend trading in  
12 MGM Studios' securities because Seery had learned from James  
13 Dondero, who was on the board, of a potential purchase of the  
14 company. The news of the MGM purchase should have caused  
15 Seery to revalue."

16                  I cannot begin to tell you the problems with that  
17 paragraph. We're not going to discuss them today. I made a  
18 promise to these folks that we wouldn't get into the merits of  
19 the complaint. But Your Honor was onto something before, and  
20 those issues, you know, may see the light of day one day. And  
21 if they do, folks are going to have to deal with it. But I  
22 will point out that at the time the communication was made,  
23 the other TRO was in effect. We didn't bring that one to the  
24 Court's attention. But the important point there, Your Honor,  
25 is December 2020. It is December 2020. That is the

1 allegation that's being made against Mr. Seery. And the fact  
2 of the matter is, because I've done the research myself, the  
3 Court will find that on December 23rd, the day the HarbourVest  
4 settlement motion was filed, it was fully public knowledge  
5 that Amazon and Apple, I think, had shut down negotiations  
6 with MGM at that time. Right? So the big secret information,  
7 it was in the public domain on December 23rd.

8 There will also never be any evidence ever that Mr. Seery  
9 got on a plane and flew to Dallas in December 2020, but that's  
10 a minor point.

11 I'd like to just conclude, Your Honor, by saying I've  
12 heard pleas that they understand. They understand, Your  
13 Honor, now they understand. It would be good if they promised  
14 the Court that they won't seek to assert claims against Mr.  
15 Seery anywhere but in this Court and comply with the order as  
16 it's written. That, that, that would be taking a little bit  
17 of responsibility.

18 I have nothing further, Your Honor.

19 THE COURT: Okay. Thank you.

20 All right. Let me give you some clue of when I'm going to  
21 be able to rule. I've been glancing at my email in hopes that  
22 something set tomorrow would go away, but that's not  
23 happening. I've got a hearing that I've been told will take  
24 all day tomorrow on a case involving a half-built hotel,  
25 luxury hotel in Palm Springs, California. So I have to spend

1 the next I don't know how long getting ready for that hearing  
2 tomorrow, and then I have what looks like a full day of  
3 hearings Thursday, including you people coming back on  
4 something.

5 MR. POMERANTZ: Your Honor, I was going to address  
6 that. We have Dugaboy's motion to enforce compliance on the  
7 2015(3) reports.

8 THE COURT: That's what it was.

9 MR. POMERANTZ: Since we haven't gotten to the motion  
10 to modify the Seery order, my suggestion would be we use that  
11 time -- of course, Dugaboy, I'm not sure if they're on the  
12 phone. They're not here. I'm not sure that's time sensitive.  
13 But if Your Honor wanted to have a hearing on that motion,  
14 which was contemplated to take place today, the Debtor would  
15 be okay having that motion heard on Thursday, perhaps by  
16 WebEx, unless Your Honor wants us to stay here, which we would  
17 if you do, and then reschedule the 2015(3) motion.

18 But again, that wasn't my motion. It's Dugaboy's. I'm  
19 not sure Mr. Draper is on. But we obviously have some  
20 calendar issues.

21 MR. MORRIS: And Your Honor, just to complete it, I  
22 think also on Thursday the Court is supposed to hear HCRE and  
23 Highland Capital Management Services motions for leave to  
24 amend their complaint in the promissory note litigation  
25 against each of them. I think that's also on the calendar for

1 Thursday. I don't expect that -- I hope that doesn't take  
2 very long, but that's also, I believe, on the calendar.

3 THE COURT: Okay. Mr. Draper, are you out there?

4 MR. PHILLIPS: I didn't see him on the list, Your  
5 Honor. I was just looking. But --

6 THE COURT: Okay. All right. Well, --

7 MR. PHILLIPS: What is the question? I can send him  
8 a text real quick.

9 THE COURT: Well, just have -- if you all could  
10 follow up with Traci Ellison, my courtroom deputy, tomorrow, I  
11 am perfectly happy to continue the motion to modify the Seery  
12 order to Thursday morning at 9:30 if Draper is willing to  
13 continue the 2015 motion.

14 MR. POMERANTZ: I know, if I was him, my first  
15 question would be is what times does the Court have available?  
16 We could work that through Ms. Ellison.

17 THE COURT: Yes. And I'm just letting you know --  
18 talk to her. Okay. Number one, I'll do these by video, okay?  
19 WebEx. But I know I don't have any time Wednesday, and  
20 Thursday's a busy day.

21 We have court Friday morning at 9:30 in--?

22 THE CLERK: Cici's Pizza.

23 THE COURT: Cici's Pizza? That's not going to take  
24 very long, right?

25 THE CLERK: I don't think so.

1           THE COURT: I can potentially do something, you know,  
2 10:00 o'clock Friday morning. Other than that, then you've  
3 got to wait a while, because I have a seven-day trial, live  
4 human beings in the courtroom starting next Monday. And so my  
5 point is mainly to tell you, as much as I would like to rule  
6 very, very fast, it's going to be, it looks like, a couple of  
7 weeks or so before I can give you a ruling on this.

8           MR. BRIDGES: Your Honor?

9           THE COURT: Yes?

10          MR. BRIDGES: May I? It's our motion. I would  
11 propose, if counsel would agree, that we just submit it on the  
12 papers.

13          THE COURT: Everybody good with that? I'm certainly  
14 good with that.

15          MR. POMERANTZ: Your Honor, I'd like there to be  
16 argument. I have a lengthy argument. I think I'd like to  
17 address a number of the things that -- Mr. Bridges made his  
18 argument today. Okay?

19          THE COURT: Okay.

20          MR. POMERANTZ: His deck, it was entitled, Motion to  
21 Modify.

22          THE COURT: Okay.

23          MR. POMERANTZ: So that's very nice of him, but I  
24 would like to make my argument.

25          THE COURT: Okay. Let's try to nail this down right

1 now. Friday at 10:00 o'clock, can we do the oral argument  
2 WebEx?

3 MR. POMERANTZ: On that one, yes, Your Honor.

4 THE COURT: On that one? Everybody good? Okay. So  
5 we'll come back Friday, 10:00 o'clock, WebEx, for that motion.

6 You know, I'm going to say a couple of things where --  
7 I've leaned toward thinking this is a pretty simple motion  
8 before me, the motion for contempt, but when people offer into  
9 evidence documents, I read your documents. Okay? That's my  
10 duty. And so I have however many exhibits I admitted today  
11 that I am going to look at and see how they sway me one way or  
12 another on this issue. But I will tell you that my gut is  
13 there has been contempt of court. Okay? I don't see anything  
14 ambiguous at all about Paragraph 5 of my July 16th, 2020  
15 order. Somebody may think I overreached, but if that was the  
16 case, someone should have argued at the time I was  
17 overreaching. Someone should have appealed the order. And I  
18 think it's a *Shoaf/Espinosa* problem at this point for anyone  
19 to argue about the enforceability of that order.

20 I think there's nothing ambiguous in the wording. Pursue  
21 is not ambiguous. There's nothing confusing about the  
22 requirement that any entity who wanted to sue or pursue a  
23 claim, you know, commence claim, pursue a claim against Mr.  
24 Seery, had to come to the Bankruptcy Court. Standard-fare  
25 gatekeeping order.

1       So what I'm going to be looking at is, do these documents  
2 I admitted into evidence change my view on that, and then the  
3 harder question is who of the alleged contemnors am I going to  
4 think it's clear and convincing committed contempt and -- who  
5 are the contemnors, and then, of course, what are the damages?  
6 Coercive or compensatory damages?

7       So, again, you know how I feel, to the extent that's  
8 helpful in your planning purposes. I'm pretty convinced  
9 contempt of court has occurred. It's just a matter of who's a  
10 contemnor and what are the damages.

11      I'll say a couple of remaining things. I continue to be  
12 frustrated, I think was the word people used, about  
13 unproductive ways we all spend our time. I am going to spend  
14 I don't know how many more hours drafting another ruling on a  
15 contempt motion, and attorneys' fees are through the roof.  
16 And, you know, I dangled out there a question I couldn't  
17 resist about MGM.

18      And I will tell you, I mean, someone mentioned about their  
19 stomach aching. Personal story, I could hardly sleep the  
20 night it became public about the Amazon purchase, because,  
21 silly me, maybe, I'm thinking game-changer. This is such  
22 potentially a windfall, an economic windfall. Maybe this  
23 could be the impetus to make everyone get in a room and say  
24 look, we've got this wonderful windfall of money. I don't  
25 know how much is owned directly or indirectly by the Debtor of

1 MGM stock. I don't know how much the Debtor manages. I  
2 don't know how much, you know, some other entity. I know it's  
3 probably spread out in many different entities. But I know, I  
4 know because I listen, that one or more of the Highland-  
5 managed CLOs has some of this, and I think I read -- remember  
6 that HCLOF, which now Highland owns more than 50 percent of,  
7 has some of this stock. Right?

8 MR. DONDERO: Do you want to know what happened?

9 THE COURT: Oh.

10 A VOICE: No.

11 THE COURT: Well, okay. So, you know, I can  
12 understand I'm getting into maybe uncomfortable territory in a  
13 public proceeding, so I'll stop.

14 But, you know, do we need to set up a status conference?  
15 Do you all need to like talk about this? Am I just being  
16 naïve? Couldn't this be a game-changer, where maybe it would  
17 give new incentive to --

18 MR. POMERANTZ: Your Honor, I would -- he's been  
19 pretty quiet through the whole hearing, Mr. Clemente. He has  
20 the Committee, that a couple of people you've heard have sold  
21 claims. They're now held by other parties.

22 You know, the door is always open. I don't think this is  
23 going to be game-changer, unfortunately. We would like  
24 nothing more, as Debtor's counsel. We don't enjoy coming to  
25 Your Honor for contempt hearings.

1           Mr. Clemente said that it was productive. We would sure  
2 participate. But right now, we have creditors who are very  
3 angry that millions and millions of dollars have been spent on  
4 really a waste of time and a waste of the Court's time and a  
5 waste of everyone's time and eating into the creditors' money.  
6 So I would ask Mr. Clemente to address that.

7           MR. CLEMENTE: I'm here.

8           THE COURT: Yes, he's way in the back, hoping to be  
9 ignored.

10          MR. CLEMENTE: It's too cold, Your Honor, where I was  
11 sitting. For the record, Your Honor, --

12          THE COURT: I noticed some entity called Muck  
13 Holdings bought HarbourVest, according to the docket.

14          MR. CLEMENTE: That's correct. Muck Holdings bought  
15 HarbourVest, and I believe also the Acis claim, and then  
16 there's a different entity that bought the Redeemer claim.

17          THE COURT: Uh-huh.

18          MR. CLEMENTE: So, as we mentioned in our -- one of  
19 our pleadings, I think it was the retention pleading for  
20 Teneo, the Committee consists of two members currently, Meta-e  
21 and UBS.

22          THE COURT: Uh-huh.

23          MR. CLEMENTE: Obviously, Your Honor just approved  
24 the UBS settlement recently. The U.S. Trustee is aware of the  
25 make-up of the Committee, and is currently comfortable with

1 the Committee maintaining a two-person membership at this  
2 point.

3 In terms of whether the MGM transaction is a game-changer,  
4 we've not yet seen, to Your Honor's point, how all of that  
5 rolls up through the various interests that the Debtor may or  
6 -- you know, may have --

7 THE COURT: Okay.

8 MR. CLEMENTE: -- that would be implicated by the MGM  
9 transaction. If ultimately the MGM transaction has to  
10 actually occur, right? I mean, so, you know, just based on  
11 what I read in the public documents, we're not sure when that  
12 transaction may actually happen. But obviously it's a good  
13 thing for the Debtor's estate because it's going to recognize  
14 value for the estate.

15 In terms of whether it ultimately changes how Mr. Dondero,  
16 you know, wishes to proceed, that's entirely up to him, Your  
17 Honor. But we don't see it as something at this point that  
18 would suggest that there's an overall back to let's talk about  
19 a pot plan because of where the MGM transaction might  
20 ultimately come out.

21 So I don't know if that's helpful to Your Honor, but those  
22 are -- that's my perspective.

23 THE COURT: Well, and I'm not trying to, you know,  
24 push a pot plan on anyone.

25 MR. CLEMENTE: No, I understand.

1           THE COURT: I'm just saying it looked like an  
2 economic windfall. I just -- I don't know how much is  
3 Highland versus other entities in the so-called byzantine  
4 complex, but, gosh, I just hoped that there might be something  
5 there to change the dynamic of, you know, lawsuit, lawsuit,  
6 lawsuit, lawsuit, motion for contempt, motion for contempt.

7           MR. CLEMENTE: Agreed, Your Honor.

8           THE COURT: Uh-huh.

9           MR. CLEMENTE: And like I said, it was a very  
10 positive development obviously for the creditors for the  
11 Debtor. But whether it's the game-changer that Your Honor  
12 would envision, I'm not sure that I can suggest at this point  
13 that it is.

14           I think that, you know, obviously, we don't like to see  
15 these lawsuits continue to be filed. That's the whole point  
16 of the gatekeeper order, Your Honor.

17           THE COURT: Uh-huh.

18           MR. CLEMENTE: I didn't say anything during the  
19 hearing, but obviously the January 9th order, as Your Honor  
20 has said many times, was in the context of a trustee being  
21 appointed.

22           THE COURT: Right. Right.

23           MR. CLEMENTE: Right? So, and the July 16th order,  
24 very similar vein, it's an outshoot of that. In fact, it was  
25 contemplated in the January 9th settlement that a CEO could be

1 appointed.

2 So I think, again, it's just -- it's important, the  
3 context in which that January 9th order came into play, for  
4 this very reason, so we could avoid this type of litigation,  
5 Your Honor.

6 THE COURT: Uh-huh.

7 MR. CLEMENTE: And so again, I didn't -- I obviously  
8 didn't rise to mention that during the hearing, but Your Honor  
9 is already aware of that. I didn't need to remind Your Honor  
10 of that.

11 THE COURT: Uh-huh. Okay.

12 MR. CLEMENTE: Anything else for me, Your Honor?

13 THE COURT: No. Thank you.

14 MR. CLEMENTE: Okay, then, Your Honor.

15 THE COURT: Sorry I picked on you. But, all right.  
16 Well, again, I hope the message has landed in the way I hope  
17 will matter, and that is I'm going to look at your documents  
18 but I feel very strongly that, unless there's something in  
19 there that, whoa, is somehow eye-opening, I'm going to find  
20 contempt of court. It's just a matter of who and what the  
21 damages are. There's just not a thing in the world ambiguous  
22 about Paragraph 5 of the July 9th, 2020 order. So I'll get to  
23 it as soon as we humanly can get to it.

24 Mr. Morris, anything else?

25 MR. MORRIS: Nothing. No, thank you.

1           THE COURT: I guess I'll see you Thursday on the  
2 WebEx. Thank you.

3           THE CLERK: All rise.

4           (Proceedings concluded at 6:00 p.m.)

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CERTIFICATE

21           I certify that the foregoing is a correct transcript from  
the electronic sound recording of the proceedings in the  
22 above-entitled matter.

23           /s/ **Kathy Rehling**

06/09/2021

24

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Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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Date

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